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# Supreme Court of the United States

317US#37

OCTOBER TERM, 1942.

SCH-SOL

No. 493

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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## PETITION FOR WRIT OF CERTIORARI.

### STATEMENT.

Your petitioner Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, in charge of the assets and affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange in liquidation, in his official capacity and on behalf of creditors and subscribers of said reciprocal insurance association, residing in thirty-four states of the Union and five Provinces of Canada whose statutory representative, your petitioner is, shows unto this Court as follows:

First: Your Petitioner is the duly qualified and acting Superintendent of the Insurance Department of the State of Missouri, and in such capacity is in charge of the

assets and affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance association now in liquidation, organized in 1898, and existing under the laws of the State of Missouri, until April 1st, 1937, when dissolved by judgment of the Circuit Court of Jackson County, Missouri. As such your Petitioner is the statutory representative of the creditors and subscribers of Manufacturing Lumbermen's Underwriters, who are located in thirty four of the United States and five Provinces of Canada. The association in liquidation was not a corporation or a mutual company but simply an association of individual subscribers to exchange indemnity on a reciprocal plan through a common attorney-in-fact acting under the provisions and limitations of the power-of-attorney executed by these subscribers (See description and analysis of this association by the United States District Court for the Western District of Missouri, in the case of *In re Manufacturing Lumbermen's Underwriters,* 18 Fed. Supp. 114).

Second: The respondents are R. E. O'Malley, predecessor in office of the petitioner, and the official surety of said R. E. O'Malley, the Central Surety and Insurance Corporation. While superintendent of the Insurance Department, R. E. O'Malley was in temporary charge of the reciprocal association, under the Missouri Insurance Code and order of Court from November 12, 1936 until April 1st, 1937, when dissolution of the association was ordered (Tr. 38-40). From April 1st, 1937 until October 20th, 1937, at which time he was succeeded in office, respondent O'Malley was in charge of the assets and affairs of the Association under the Missouri Insurance Code.

Third: The provisions of the Missouri Insurance Code relating to insurance organizations in an insolvent or hazardous condition are Sections 6052 to 6069, inclusive, R. S. Missouri, 1939 (Copied in the appendix to Petitioner's Brief).

Fourth: The rights of the subscribers in the reciprocal insurance association were governed by the written power-of-attorney executed by each reciprocal subscriber. The power-of-attorney is entitled "Application for Insurance," 18 Fed. Supp. 114, l. c. 117, ff. (Appendix to Petitioner's Brief pages 41-45). This contract provided that the subscribers should make an annual premium deposit out of which 20% should be paid to the corporate attorney-in-fact for defraying all except certain named expenses incident to the exchange of indemnity. It was stipulated that the remainder should be kept in a separate individual account and that there should be no joint funds. These separate funds were to be held by a trustee, residing in Kansas City for the use and benefit of the subscribers, subject to payment of losses and other specified expenses. It was provided that this power-of-attorney could be revoked on written notice at which time all funds belonging to the subscribers should be returned.

Fifth: Upon being placed in charge of the affairs of the reciprocal association, the respondent O'Malley proceeded to expend large sums from the subscribers' individual trust accounts allegedly for the purpose of preserving and attempting to rehabilitate and reinsure the business of the association. No application to the Court was made for authority to so expend the individual trust funds of the subscribers. The employees, formerly paid by the attorney-in-fact out of the 20% of the premium income allotted to it, were paid by the respondent O'Malley out of the individual trust funds of the subscribers. The corporate attorney-in-fact, Rankin-Benedict Underwriting Company, had been paid approximately $600,000 out of the annual premium deposits of $3,000,000 for the operation of the association during the forthcoming year, the time covered by respondent O'Malley's control.

Sixth: When the respondent O'Malley presented his final report and accounting, exceptions thereto were filed

by his successor in office with respect to the expenditures from subscribers' funds. After hearing evidence adduced at the trial in support of the accounting and in support of the exceptions thereto, the trial court surcharged respondent O'Malley with $85,264.44 and rendered judgment against the respondent O'Malley and his surety, the respondent Central Surety and Insurance Corporation (Tr. 116-118). The trial court found in its judgment against the respondents, among other things, that the respondent O'Malley had without authority paid exorbitant and unreasonable sums of money under the guise that said sums were for salaries for services rendered in the settlement of the business of Manufacturing Lumbermen's Underwriters, when, in fact, no such services were rendered; that the respondent O'Malley paid out large sums as rents for quarters unnecessary to the business and affairs of Manufacturing Lumbermen's Underwriters and permitted them to be used for the benefit of others; that the expenditure of a total sum of $85,264.44 was not necessary to the settlement of the business of Manufacturing Lumbermen's Underwriters. The trial court allowed the respondent O'Malley credit in his account for the sum of $43,648.04 (Tr. 105-107).

Seventh: On appeal the Supreme Court of Missouri reversed the judgment of the trial court holding that under the Missouri Insurance Code, Sections 6052-6069, the Superintendent of Insurance in charge of a reciprocal insurance association has the power, without application to the Court or notice of hearing to the subscribers thereof, to make expenditures out of the trust funds of subscribers for the operation of the office of the attorney-in-fact and for the purpose of "rehabilitating, reinsuring and maintaining as far as possible the *status quo*." It was held by the Supreme Court of Missouri that the Superintendent of Insurance was not a mere receiver but an administrative agency having power to expend the individual funds of subscribers in his discretion without prior hearing or

notice to the subscribers. The Supreme Court of Missouri made no express reference to or ruling upon the effect of the Missouri Insurance Code as an impairment of the contractual rights growing out of the power-of-attorney.

This interpretation of the Insurance Code was recognized by the Missouri Supreme Court as an interpretation of first impression, the sections involved being recently enacted (Tr. 1341, 1353).

Eighth: When the original opinion reversing the judgment of the trial court was rendered, your petitioner filed a motion for rehearing (Tr. 1358-1387). This motion charged that the construction given to the powers of the Superintendent of the Insurance Department under the Missouri Insurance Code, permitting the Superintendent of Insurance without prior notice, hearing or order of Court to expend the individual funds of the subscribers (whom petitioner represents) violated Section 10, Article I, Clause 1, of the Constitution of the United States, because such exercise of these powers amounted to an impairment of the obligation of contract by the State. Such action impaired the obligation by which the subscribers had specifically contracted against the use of their individual funds (the 80% remaining after the payment of 20% for expenses of the operation of the Association) for purposes other than those permitted in the power-of-attorney. The motion for rehearing also charged that this construction given by the Court to the powers of the Superintendent under the Code deprived the subscribers (represented by the petitioner) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: The Superintendent was held to have the legal authority under the state law to expend, from the 80% held as individual trust funds, unlimited amounts for operating expenses, rent and salaries while in charge under the Code without notice or hearing accorded to the individual and private subscribers before the Superintendent or in

Court. This delegation of powers to expend private funds without prior notice or hearing was asserted to be a deprival of due process of law.

The Supreme Court overruled the motion for rehearing without opinion, refusing to write upon the constitutional issues raised in the motion for rehearing.

A motion to transfer to the Court *en banc* was filed both in the Court *en banc* and in Division Number 2 which rendered the opinion. The Court *en banc* denied the motion to transfer in a written opinion (Tr. 1470-1472); *Scheufler* v. *Manufacturing Lumbermen's Underwriters*, 163 S. W. 2d 749, denying jurisdiction to entertain the motion. The motion to transfer filed in Division Number 2 was overruled without opinion (Tr. 1472).

Ninth: The petitioner, as Superintendent of Insurance and as the representative of the subscribers whose funds have been expended, then filed this petition for certiorari to review the constitutionality of the Missouri Insurance Code as interpreted by the Missouri Supreme Court with respect to the constitutional right of the Superintendent to expend the individual funds of subscribers of a reciprocal association, placed in his charge, for general operating expenses without prior notice or hearing or determination of the necessity therefor, the reasonableness thereof or the right to do so.

**ASSIGNMENTS OF ERROR.**

1. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order violates Section 10, Article I, Clause 1, of the Constitution of the United States in this: So construed, the laws of Missouri impair the obligation of the contract embodied in the power-of-attorney entitled "Application for Insurance" (Appendix to Petitioner's Brief, page 41).

The subscribers in their power-of-attorney, a contract previously approved by the state (Sections 6078 to 6080, R. S. Missouri, 1939) had contracted against the use of any of their individual trust funds for the very purposes for which the Missouri law permits their use in the case at bar. The Missouri Supreme Court erred in refusing to pass upon this point and to hold the law unconstitutional on its face and in its operation, after adopting the construction given the Code in the case at bar.

2. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order deprives the subscribers (whom petitioner here represents) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: That the funds in the hands of the Superintendent were the individual funds of the subscribers and kept in a separate account for the pur-

pose stated in the power-of-attorney; 20% had been deducted and previously paid for operating expenses. The Insurance Code as construed by the Missouri Supreme Court (Sections 6052 to 6069, R. S. Missouri, 1939) permits the Superintendent to spend, out of the 80% held in trust for the individual subscribers for specific purposes, sums for operating expenses, rent and salaries in the discretion of the Superintendent without prior notice or hearing to the subscribers. The Code delegating power to the Superintendent to expend individual funds of the subscribers without any notice or hearing is a deprival of due process of law. The Missouri Supreme Court erred in refusing to pass upon this charge of unconstitutionality and to hold the Code unconstitutional after adopting the construction given it in the case at bar.

**REASONS FOR ALLOWANCE OF WRIT.**

1. This cause involves the serious and important question of the constitutionality of the Missouri Insurance Code relating to the powers of the Superintendent of Insurance when placed in charge of a reciprocal insurance association organized and existing under Article 11, Chapter 37, R. S. Missouri, 1939, in which the rights of the subscribers, attorney-in-fact and third persons are governed by a specific written contract provided for and required by Missouri statutes (Sections 6078 to 6080, R. S. Missouri, 1939). The Superintendent of the Insurance Department of the State of Missouri on behalf of subscribers, creditors and policy holders is himself challenging the constitutionality of Sections 6052 to 6059 of the Missouri Insurance Code in the light of the due process clause and in the light of the contract clause of the Federal Constitution. In the case at bar the trial court has found that without any notice or hearing to the subscribers, the respondent O'Malley, while in charge of the Association, misspent over $85,000 of moneys belonging to the subscribers. The Supreme Court of Missouri has construed the statutes relating to the powers of the Superintendent to authorize the Superintendent while in charge of a reciprocal insurance association to spend the individual funds of the subscribers without notice or hearing to the subscribers in court or before the Superintendent, and further authorizes these funds to be spent for purposes for which the subscribers have specifically contracted that their funds may not be used.

In the interest of settling the grave issues of constitutionality involved in the far-reaching provisions assailed and in the interest of justice to the subscribers located in thirty-four of the United States and five provinces of Canada, it is submitted that this Court should assume jurisdiction and settle these questions.

2. The powers of the Superintendent under Sections 6052 to 6069, R. S. Missouri, 1939, when exercised in the case of reciprocal insurance associations under control of the Superintendent violate the due process clause of the Federal Constitution contained in the Fourteenth Amendment thereto. The funds which respondent O'Malley, as Superintendent, used to pay operating expenses, rent and salaries without approval of court and without hearing or notice of any character were individual private property under the power-of-attorney; they were not general association or company funds. (See *In re Manufacturing Lumbermen's Underwriters,* 18 Fed. Supp. 114). The use of such private funds by an administrative agent without according any notice and opportunity to be heard on the question of the liability of the private property to the use of the administrative agency is a deprival of due process of law. Such conduct and the statute authorizing it are unconstitutional and in violation of the principle of the following case: *Southern Railway Company* v. *Virginia ex rel. Shirley,* 290 U. S. 190, 78 L. Ed. 260.

3. The statutes, Sections 6052 to 6069, R. S. Missouri, 1939, empowering the Superintendent without notice or hearing or authority of court to expend individual private trust funds owned by the subscribers, not subject to expenditures for rent, salaries, operation and the like, violate Section 10, Article I, Clause 1, of the Constitution of the United States in this: The power-of-attorney creates a trust fund of 80% of the annual deposits to be held for the individual account of the subscribers and not subject to the expenses of operation. These expenses of operation under the contract were to be paid from the funds of the attorney-in-fact who received 20% of each deposit for these purposes. The Missouri statute as construed by the Missouri Supreme Court permits the Superintendent of Insurance, without any notice or hearing having been accorded the owners of the individual funds,

to impair the contract and in violation of the express provisions thereof to pay expenses of operation in his discretion from subscribers' individual trust funds. The state law under which this action is taken was enacted subsequent to the formation of the association and execution of the power-of-attorney. Laws of Missouri, Extra Session, 1933-34, pages 66-71. The obligation of the contract (the power-of-attorney) is unconstitutionally impaired by the action of Missouri in enacting and enforcing a law after execution of the contract which causes or permits action to be taken in violation of the express terms of the contract and trust created thereby, Section 10, Article I, Clause 1, United States Constitution; *Coolidge* v. *Long*, 282 U. S. 582, 75 L. Ed. 562.

For these reasons it is respectfully submitted that this petition should be granted.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### I.

### THE OPINIONS OF THE COURT BELOW.

*Lucas* v. *Manufacturing Lumbermen's Underwriters et al.*, (Mo. Sup. Div. No. 2; not yet officially reported) 163 S. W. 2d 750.

*Scheufler* v. *Manufacturing Lumbermen's Underwriters et al.*, (Mo. Sup. *En Banc;* not yet officially reported) 163 S. W. 2d 749.

## II.

## JURISDICTION.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 344, as amended by the action of February 13, 1925, 43 Stat. 937; U. S. C. A., Title 29, Sec. 344.

2. The date of the original judgment of the Supreme Court of Missouri to be reversed is May 5, 1942 (Tr. 1339); Petition for Rehearing was filed May 15, 1942, within the time provided by the Rules of the Supreme Court of Missouri (Tr. 1358); the Petition for Rehearing was denied June 17, 1942 (Tr. 1403); Motion to Transfer to the Court *En Banc* was filed in Division No. 2, June 25, 1942 (Tr. 1422); Motion for Leave to File Motion to Transfer Court *En Banc* was filed in the Supreme Court of Missouri *En Banc* on June 25, 1942 (Tr. 1403), and Leave was denied July 7, 1942 (Tr. 1469); on July 28, 1942, Division No. 2 of the Supreme Court of Missouri denied the Motion filed therein to Transfer to the Court *En Banc* (Tr. 1472).

3. Two questions are raised in this Court. The first question is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted to the Superintendent of Insurance to deal with the funds in individual accounts of reciprocal insurance subscribers, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of his property without due process of law. The second and only other question here raised is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted the Superintendent of Insurance to spend individual trust funds for expenses for which the individual trust funds were not liable under the contract of the subscriber, are in violation of Section 10, Article I, Clause 1, of the Constitution of the United States forbidding any state to enact a law impairing the obligation of contract.

## III.

## STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari and are not repeated here. It should be made clear here that the petitioner is not attacking the correctness of the Missouri Court's construction of the Missouri statutes or seeking a review of the opinion upon any other than federal grounds.

In addition to the opinions of the Court below in this cause there are two opinions of the United States District Court which bear upon the nature of the Association known as Manufacturing Lumbermen's Underwriters involved in this action. See *In re Manufacturing Lumbermen's Underwriters,* (District Court of the Western District of Missouri, 1936) 18 Fed. Supp. 114; *In re Manufacturing Lumbermen's Underwriters,* (District Court of the Western District of Missouri, 1937) 46 Fed. Supp. 343. See, also, Annotation in 94 A. L. R., beginning at page 836 on reciprocal insurance.

On the face of the principal opinion of the Missouri Supreme Court in the case at bar it would appear that no Federal question was raised. The Supreme Court of Missouri refused to discuss in either of its opinions below, the charges of unconstitutionality made in the motion for rehearing and in the motions to transfer the cause to the Court *En Banc.* The motion for rehearing was overruled without opinion. In denying leave to file in the Court *En Banc* a motion to transfer, the Court *En Banc* did not discuss the federal questions (Tr. 1470-1472). The motion to transfer to the Court *En Banc* filed in Division No. 2 was overruled without opinion (Tr. 1472).

As stated in the principal opinion of the Missouri Supreme Court, the statutes involved were new, having been enacted in 1933 and having never been judicially construed before in respect of the matters involved here.

This was a case of first impression. It was not until the Supreme Court of Missouri gave to the Insurance Code the construction which is here assailed that a definitive federal constitutional issue was raised. Prior to that time the only construction of the statutes had been by the trial court which did not give to the Code the meaning adopted later by the Supreme Court and now assailed as being in violation of the Federal Constitution. Immediately after the rendition of the opinion of the Supreme Court of Missouri containing the construction of the statutes assailed here as unconstitutional, the petitioner filed in the Supreme Court of Missouri his motion for rehearing setting up the claimed violation of the due process clause and the contract clause of the Federal Constitution (Tr. 1359-1367).

## IV.

## ASSIGNMENTS OF ERROR.

1. The Missouri Insurance Code (Sections 6052-6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the subscribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order of court deprives the subscribers (whom petitioner here represents) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in this: That the funds in the hands of the Superintendent were the individual funds of the subscribers and kept in a separate account for the purpose stated in the power-of-attorney; 20% had been deducted and previously paid for operating expenses. The Insurance Code as construed by the Missouri Supreme Court (Sections 6052 to 6069, R. S. Missouri, 1939) permits the Superintendent to spend, out of the 80% held in trust for the subscribers for specific purposes, sums for operating expenses, rent and salaries in the discretion of the Superintendent without prior notice or hearing to the subscribers. The Code delegating power to the Superintendent to expend individual funds of the subscribers without prior notice or hearing is a deprival of due process of law. The Missouri Supreme Court erred in refusing to pass upon this charge of unconstitutionality and to hold the Code unconstitutional after adopting the construction given it in the case at bar.

2. The Missouri Insurance Code (Sections 6052 to 6069, R. S. Missouri, 1939) as construed by the Supreme Court of Missouri to give the Superintendent of Insurance authority to pay operating expenses, rent, salaries and the like from the individual trust funds of the sub-

scribers (the 80% remaining after 20% prepayment for expenses) without prior notice, hearing or order of court violates Section 10, Article I, Clause 1, of the Constitution of the United States in this: So construed, the laws of Missouri impair the obligation of contract embodied in the power-of-attorney entitled "Application for Insurance" (appendix to this brief p. 41). The subscribers in their power-of-attorney, a contract previously approved by the state (Sections 6078-6080, R. S. Missouri, 1939) had contracted against the use of any of their individual trust funds for the very purposes for which the Missouri law permits its use by virtue of the decision in the case at bar. The Missouri Supreme Court erred in refusing to pass upon this point and to hold the law unconstitutional on its face and in its operation, after adopting the construction given the Code in the case at bar.

## V.

## SUMMARY OF THE ARGUMENT.

1. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of reciprocal insurance subscribers without any notice or hearing, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to enact a law which deprives a person of his property without due process of law.

2. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of individual reciprocal insurance subscribers held in trust under the power-of-attorney for purposes contrary to the obligation of the power-of-attorney in the discretion of the Superintendent without notice or hearing in Court or before the Superintendent, impair the obligation of the contract contained in the power-of-attorney in violation of Section 10, Article I, Clause 1, of the Constitution of the United States.

3. Federal questions were timely presented in this case. It was sufficient to present the charges of unconstitutionality on motion for rehearing because the unconstitutional construction of the statute could not have been anticipated and the statutes were first construed in their unconstitutional manner by the Supreme Court of Missouri in the principal opinion below.

4. The writ should be granted in this case because the Missouri Supreme Court has decided federal questions of substance not theretofore determined by this Court (Rule 38, Subsection A—Par. 5, of this Court.)

## VI.

## ARGUMENT.

**1. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of reciprocal insurance subscribers without any notice or hearing violates the Fourteenth Amendment to the Constitution of the United States forbidding any state to enact a law which deprives a person of his property without due process of law.**

The statutes (Sections 6052-6069, R. S. Missouri, 1939) relating to the powers of the Superintendent in cases of this character violate the due process clause of the Federal Constitution. It has long been held that the action of a state in authorizing one of its administrative agencies to deal with the property of a citizen or a business subject to regulation without prior notice and opportunity to be heard on the liability of the private property to the use of the administrative agent is a deprival of due process of law. *Southern Railway Company* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 78 L. Ed. 260. In this case the Supreme Court of the United States held that a state administrative agent could not, without violating the Federal Constitution, order a railway company to abolish a grade crossing and construct an overhead passage without prior notice and hearing. It was further held that an indefinite right of review later accorded was no substitute for notice and opportunity to be heard prior to action.

This principle governs the case at bar. Here, under the construction given by this Court to the statutes relating to proceedings against insurance companies, the Superintendent is empowered without notice or hearing to expend individual trust funds for purposes against which the owner of the trust fund has specifically contracted

that the funds shall not be liable, and for purposes for which in the year preceding the commencement of this action by Respondent O'Malley, the subscribers had paid $600,000 to the attorney-in-fact (Tr. 129). We will not repeat the nature of the relationship between the subscribers and the attorney-in-fact and the character of the trust fund which O'Malley violated without authority. The nature of these relationships involves a construction of the power-of-attorney which is the charter of the rights and obligations of the subscribers, the trustee and the attorney-in-fact. This is discussed lucidly and the trust funds found to be private individual funds in the thorough consideration of Judge Otis in *In re Manufacturing Lumbermen's Underwriters,* 18 Fed. Supp. 114. (The power-of-attorney is set out in 18 Fed. Supp. l. c. 117, and in the appendix to this brief at p. 41.)

The situation briefly is this: A group of reciprocal subscribers make annual deposits of $3,000,000 for the forthcoming year; the attorney-in-fact is paid 20% or $600,000 to maintain the offices, meet the payrolls and pay other expenses connected with the maintenance of the business. The remaining 80% with prior accumulations was placed in trust for the subscribers individually. A Superintendent of Insurance who confessedly is not advised of the financial condition of the association files a petition in court under the Missouri statutes. Without notice and hearing he is placed in temporary charge of the business of the association. He takes charge of the assets in the trust fund belonging to the subscribers. He does not take charge of the funds and assets of the attorney-in-fact which is still in existence nor does he require the substitute attorney-in-fact, named a party to this cause after the commencement of this suit to perform any of the obligations of the attorney-in-fact. Without notice and hearing he proceeds to expend the trust fund for the purpose of meeting the payroll and other expenses which should be borne by the attorney-in-fact or from the funds paid to the attorney-in-fact for that

purpose. When it is sought to charge him with responsibility for violating these trust funds and wasting the assets, the trial court finds that his actions have been unreasonable, exorbitant and without legal authority; that money has been spent for purposes for which the subscribers received no benefit. The Supreme Court of Missouri holds that the Superintendent has power to spend these trust funds without according the subscribers and owners thereof a notice or hearing in any form; that the discretion vested in him by law can be exercised by him without right of judicial investigation in the owners of the funds which were dissipated. That Court made this holding on the express ground that the Superintendent was merely maintaining the *status quo*. The truth is when the problem is analyzed that the Superintendent violated the *status quo* and spent individual trust funds for purposes stipulated against in the trust instrument, the power-of-attorney, and for purposes entirely unconnected with the interest of the owners. The statutes permitting such action are unconstitutional, at least, when applied to reciprocal associations such as involved here.

**2. Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers of the Superintendent of the Insurance Department granted thereby to expend funds of individual reciprocal insurance subscribers held in trust under the power-of-attorney for purposes contrary to the obligation of the power-of-attorney in the discretion of the Superintendent without notice or hearing in court or before the Superintendent, impair the obligation of the contract contained in the power-of-attorney in violation of Section 10, Article I, Clause 1, of the Constitution of the United States.**

As stated by the District Court in its analysis of the structure of this company in 18 Fed. Supp. 114, the power-of-attorney is the contract which governs the rights of the parties to the reciprocal insurance association. This contract creates a trust fund of 80% of the annual deposits to

be held for the individual account of the subscribers and not subject to expenses of operation. These expenses of operation under the contract are to be paid from the funds of the attorney-in-fact which received 20% of each deposit for those purposes. The Missouri Supreme Court in this case construes the laws of Missouri to permit the Superintendent without notice or hearing being accorded the owners of the fund to impair the contract and in violation thereof to pay expenses of operation in his discretion from the subscribers' trust funds. It is well established that the obligation of a contract is unconstitutionally impaired by the action of a state in enacting and enforcing a law after execution of a contract which causes or permits action to be taken in violation of the express terms of the contract or trust created thereby. *Coolidge* v. *Long*, 282 U. S. 582, 75 L. Ed. 562. And this is true where the contract is impaired by delegated authority, *Grand Trunk W. R. Co.* v. *Railroad*, 221 U. S. 400, 55 L. Ed. 756. In the *Coolidge case*, at 282 U. S. 595, 75 L. Ed. 566, this Court said:

> "The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."

While in the case at bar, the Court said that the Superintendent was maintaining the *status quo*, the fact is that he required neither the attorney-in-fact Rankin-Benedict Underwriting Company nor the substitute attorney-in-fact Vincent B. Coates to respond to their obligations nor did he seize their funds. Contrary to the *status quo*, he seized the trust funds of the subscribers and used them for purposes they had specifically contracted against. The construction of the laws of the State to permit such

action is a violation of the Federal Constitution prohibiting the impairment of a contract by a state, and prohibiting arbitrary confiscation.

**3. The Federal questions were timely presented in this case. It is sufficient to present the charges of unconstitutionality on motion for rehearing because the unconstitutional construction of the statute could not have been anticipated and the statutes were first construed in their unconstitutional manner by the Supreme Court of Missouri in the principal opinion below.**

The statutes here involved were first construed in an unconstitutional manner on appeal to the Supreme Court of Missouri. The opinion in the case at bar clearly shows that this is a matter of first impression. Therefore it cannot be said, as it was said in *Herndon* v. *Georgia*, 295 U. S. 441, that the respondent should have anticipated the unconstitutional construction of the statutes. Consequently presentation in detail of the federal questions on motion for rehearing is sufficient presentation in point of time. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451; *Great Northern Railway Company* v. *Sunburst Oil Refining Company*, 287 U. S. 358-367, Annotations in 49 L. Ed. 413, 67 L. Ed. 556, 79 L. Ed. 1539.

And in this case here it is claimed that the construction by the highest court of this state of the statutes applicable to the contract in issue is repugnant to the Constitution of the United States.

The question involved here was expressly ruled in a case arising in Missouri in the *Brinkerhoff-Faris Trust and Savings Company case*, 281 U. S. 673, l. c. 677, 74 L. Ed. 1107, l. c. 1111 ff.

In that case the Supreme Court of Missouri construed certain tax statutes in a manner which deprived the petitioner of its right in violation of the Federal Constitution.

For the first time on rehearing the petitioner set up the violation of the Federal Constitution. There, as in this case, the petition for rehearing was denied without opinion. On certiorari the Supreme Court of the United States held that a federal constitutional question was involved and that it was timely presented and that the judgment of the Supreme Court of Missouri should be reversed. There it was said (281 U. S. l. c. 677-678, 74 L. Ed. 1111-1112):

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claim on the merits, that, in applying the new construction of article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, *ante,* 870, 50 Sup. Ct. Rep. 326. The petition was denied without opinion. This court granted certiorari. 280 U. S. 550, *ante,* 608, 50 Sup. Ct. Rep. 152. We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The rule was stated by this Court in *Herndon* v. *Georgia,* 295 U. S. 441, l. c. 443, 79 L. Ed. 1530, l. c. 1532, as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & P. R. Co.* v. *Southern P. Co.,* 137 U. S. 48, 34 L. Ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder,* 149 U. S. 580, 585, 37 L. Ed.

856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179. 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited.

"Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders* v. *Shaw*, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, 79, 74 L. Ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320, 74 L. Ed. 870, 875, 50 S. Ct. 326; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1111, 1112, 50 S. Ct. 451; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, 77 L. Ed. 231, 236, 53 S. Ct. 98, 86 A. L. R. 298; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 367, 77 L. Ed. 360, 367, 53 S. Ct. 145, 85 A. L. R. 254. The whole point, therefore, is whether the ruling here assailed should have been anticipated."

Applying that test to this case, it is clear that the ruling could not be anticipated. The statutes were recently enacted. They had never been construed before. The Missouri Supreme Court in its opinion below states that the Code governing the conduct of the Superintendent was new, having been recently amended in 1933. The trial court had not given to the statutes the construction here assailed. It had found in favor of the petitioner on the law and on the facts. An unconstitutional construction of the statutes was certainly not the construction that would be reasonably anticipated by the peti-

tioner. Therefore petitioner's conduct meets the test of the *Herndon* case.

In determining whether the federal questions in this case were raised in time the federal decisions must be looked to. The Federal Courts consistently hold that the existence of a federal question is to be determined ultimately by the Federal Courts. *International Harvester Company* v. *State of Missouri ex Inf. Attorney General,* 234 U. S. 199, 58 L. Ed. 1276, 34 S. Ct. 859; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451.

When the motion for rehearing in this case was presented raising without doubt two serious Federal questions the Missouri Supreme Court denied the motion without opinion. The Court refused to recognize and write upon the federal questions, or even to write that the questions were not involved. The Missouri Court in its failure to write may have had in mind that line of decisions which hold that a federal question is properly in a case when the Court writes upon it whether timely presented or not. See *Great Northern Railway Company* v. *Sunburst Oil and Refining Company,* 287 U. S. 358, l. c. 367, 77 L. Ed. 360, l. c. 368. However, as stated in the *Great Northern Railway case, supra,* and in the *International Harvester Company case, supra,* the mere failure of the Court to write upon the question does not prevent further review. Therefore the failure of the Missouri Court to recognize or write upon these serious federal questions has no effect in law upon the fact of their involvement in this case.

**4. The writ should be granted in this case because the Missouri Supreme Court has decided federal questions of substance not theretofore determined by this Court (Rule 38, Subsection A—Par. 5).**

Petitioner submits that he has raised federal questions of substance not theretofore determined by this Court within the meaning of Subsection A, Par. 5, Rule

38 of this Court. The questions raised are referred to in points 1 and 2 of the foregoing argument.

And in this connection, petitioner submits that this is the character of case which deserves exercise of the discretionary writ of certiorari. Both for the purposes of this case and for conduct in the future, it is desirable that the validity of the Missouri Insurance Code relating to the powers of the Superintendent of Insurance in charge of a reciprocal insurance association under court order, be determined authoritatively. This Court has in the past seen fit to pass upon the constitutionality of bank and insurance liquidation and conservation measures on writ of certiorari. For example see *Doty* v. *Love*, 295 U. S. 64, 79 L. Ed. 1303, where this Court reviewed the statutes of Mississippi governing liquidation and reorganization of closed banks. See *Neblett* v. *Carpenter*, 305 U. S. 297, 83 L. Ed. 182, in which this Court reviewed the provisions of the California Insurance Code relating to rehabilitation of insurance companies in the hands of the Insurance Commissioner for conservation, liquidation and rehabilitation.

The petitioner in this cause speaks on behalf of thousands of creditors and subscribers of this reciprocal insurance association in the protection of their private rights; and in his official capacity also petitioner urges this Court to settle the serious constitutional questions here raised.

**Conclusion.**

Petitioner, therefore, respectfully submits that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively settled; and in order that justice may be done. And to such end the petitioner respectfully submits that a writ of certiorari should be granted and this

Court should review the decision of the Supreme Court of Missouri and finally reverse it.

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## APPENDIX I.

### Provisions of Missouri Insurance Code Involved, from Revised Statutes of Missouri, 1939.

*Sec.* 6052. *Proceedings to wind up companies.*

Whenever it shall appear to the superintendent of the insurance department, from any examination made by himself, or from the report of a person or persons appointed by him, or from the statements of the company, or from any knowledge or information in his possession, (1) that the capital stock or guarantee fund of any company heretofore or hereafter incorporated or organized under the laws of this state doing in this state any kind of an insurance business is impaired, or (2) that such company is insolvent, or (3) that such company has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent or his deputy or his examiner, or (4) that such company has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction, the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society, order, partnership or individual without first having obtained the written approval of the superintendent of insurance as provided by law, or (5) that such company is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders or to its creditors or to the public, or (6) that such company has willfully violated its charter provisions or any other law of the state, or (7) that such company has an officer who has refused to be examined under oath touching its affairs, or (8) that such company is organized under Articles 2, 3, 4, 5, 6, 7, 8 or 11 of this chapter and is found

to be in such condition after examination that it could not meet the requirements for incorporation and authorization specified in the law under which it was incorporated or is doing business, or (9), that such company has ceased to transact the business of insurance for a period of one year, said superintendent may institute a suit or proceedings in the circuit court in the county or city in which such company was organized or in which it has or last had its principal or chief office or place of business or in the county of Cole, to enjoin said company from further prosecution of its business, either temporarily or perpetually, or for a judgment dissolving such corporation or for both; and after the entry of such decree or judgment, the court upon the motion of the superintendent of the insurance department may order the liquidation, settlement and winding up of the affairs of such company or the rehabilitation of such company as provided in this chapter, together with such other decrees and orders in connection therewith as the court shall deem advisable. (R. S. 1929, §5941. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6053. *Manner of commencing suit.*

Such suit shall be commenced by filing a petition in the name of the superintendent of the insurance department of this state, as plaintiff, against the company, proceeded against as defendant, and said petition shall contain a brief statement of the condition of the company proceeded against, or of the causes upon which the proceeding is based; it may also contain a prayer for temporary or permanent injunction, or for both, and shall conclude with a prayer for general relief, under which prayer the court may grant any relief or issue any injunction or writ, and make any decrees or orders, under and within the provisions of this chapter, as shall be found advisable or necessary. (R. S. 1929, §5942.)

*Sec. 6054. Of the issuing, service and return of process.*

Upon the filing of such petition, the clerk of the court shall forthwith, and of course, issue a summons, requiring the defendant to appear before the court, if it be in session, or before any judge thereof, if the court has either adjourned for the term or to a day beyond three days from the date of issue of said summons, and to answer the petition on the return day of said summons. Said summons shall be returnable in three days after its issue, and shall be served as provided by law for service of process upon corporations in civil cases. If an injunction is prayed for, the petition shall be presented to the circuit court, or judge thereof, and the court or judge to whom it is presented shall thereupon make an order for the issuing of an injunction, providing its term and fixing the return day of the summons, which shall not exceed three days from its date; and upon such order being made, the petition shall thereupon be filed in the clerk's office, and the writ of injunction shall issue, together with the summons as above provided. Any writ of injunction issued under this law may be served and enforced as provided by law in injunctions issued in other cases, but the superintendent of the insurance department shall not be required to give any bond as preliminary to or in the course of any proceedings to which he is a party as such superintendent, under this chapter, either for costs or for any injunction, or in case of appeal to either the supreme court or to any appellate tribunal. If the first summons issued be not served, then other summons may issue, returnable as the court or judge may direct; or the court or judge to whom said petition has been presented, or who has jurisdiction of the case, when satisfied by the affidavit of the superintendent, or of any other person, either when the petition is first presented or afterward, or on return of any summons unserved, that for any cause personal service cannot be made on said company within the three days, may order the

company proceeded against to be notified of the institution of the suit, its nature, and of the return day of the summons, which in such case shall not be less than fifteen nor more than twenty-three days from the date thereof; and thereupon the clerk shall cause notice to be published in some newspaper published in the city or county in which the suit is pending - if there be a daily paper, then in such paper for ten days consecutively; or if there be no daily paper, then a weekly paper three times successively - in either case the last publication to be at least three days before the summons is returnable. Proof of such publication shall be made as provided by law for like notices in civil cases. (R. S. 1929, §5943.)

*Sec.* 6055. *Proceedings on return of process.*

Upon the return of such process duly served, or proof of such publication made, the petition shall be heard summarily before said court or a judge thereof, who may, at such hearing, or at any time thereafter, for cause shown, dissolve, modify or continue the injunction: *Provided, however,* that before the defendant shall be permitted to make any such motion, or to be heard on any motion it shall first have answered the petition. If, on the return day of the summons, the defendant shall enter its appearance to the action, and apply for further time in which to answer, the court or judge may extend the time for answering to not exceeding three days from said return day. If the defendant fails to answer on the return day, or within the time granted it as above, or fails to appear, the court or judge shall, on motion of the plaintiff, proceed to hear, determine and adjudge the cause, as herein provided, and thereafter proceed in such cause as herein provided. The pleadings and proceedings, in so far as not otherwise regulated by this chapter, shall be as in other civil causes. All pleadings shall be filed within the time herein provided, or as designated by the court or judge, and without regard to terms of the court

as to the time of filing the same; nor shall the adjournment of the court for a term work a postponement of proceedings hereunder to the next term, but the same may be had in vacation as well as term time, and any orders made in vacation or by the judge shall be entered up as of a special term. (R. S. 1929, §5944.)

*Sec.* 6056. *Hearing by the court.*

The court or judge, on the return day of the summons, shall set the case for hearing on some day not exceeding five days from the return day. All pleadings shall be made up and filed at or before said day for hearing, and the judge or court shall, without the intervention of a jury, and without unnecessary delay, proceed to hear and determine said cause; or on motion of the plaintiff, but in no other case, the judge or court may, on the return day, refer the hearing of the case to a referee, with power to hear the testimony and report his conclusions on the same to the court or judge. If the case is referred, the referee shall forthwith proceed to hear the same, and shall file his report within ten days after the conclusion of the testimony. Any referee failing to at once proceed with the hearing, or to file his report within the time aforesaid, may be removed by the court or judge, in which case he shall not receive any pay or allowance whatever for his services; and the court or judge may thereupon hear the case or appoint a new referee. The fees of the referee shall be taxed and paid as costs in the case. The referee may be allowed for his services not exceeding one dollar and fifty cents for each hour actually spent by him in hearing the testimony in the case, and for taking down the testimony and writing out the same in his report, not exceeding fifteen cents per each hundred words in his report, no pay or allowances whatever being made for exhibits or their contents, or for figures or numerals; and in addition to the above, he may be allowed a fee of not exceeding one hundred dollars

for his services in making his report; besides these, no other fees or allowances shall be taxed in favor of the referee or anyone employed by him, and he shall pay his own clerk or reporter, if he employ one. Exceptions to the report of the referee may be filed by either party. If no exceptions are filed within three days after the report is presented to the court or judge, it shall be confirmed, and judgment entered thereon. In a hearing before the court or judge, or referee, certified copies of the statement made by the company proceeded against, or of reports of examinations of the company made by the superintendent, or persons appointed by him, shall be received, if offered by the superintendent, as *prima facie* evidence of the facts therein contained pertaining to the condition and affairs of the defendant. If the finding be for the defendant, it shall be lawful for the superintendent to appeal the case. If the finding be for the plaintiff, the court shall enjoin the company, either temporarily or perpetually, from the further prosecution of its business, or the court shall render judgment dissolving the company, or the court may render both such decree and judgment. Such decree or judgment shall, for all purposes of an appeal, be considered a final judgment, and the defendant may appeal from the same as in other civil cases: *Provided,* the appeal be prayed for and perfected within five days after such judgment, and that the bond shall be for such an amount as the court may fix; *and provided,* that no appeal nor *supersedeas* bond shall operate as a dissolution of an injunction or judgment, if one has been issued. (R. S. 1929, §5945. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec. 6057. Insurance superintendent to take charge - when.*

If the superintendent of the insurance department shall apply, either at the time of or after the filing of the petition referred to in section 6052, R. S. of Mo. 1939, the

court may, if the court deem it necessary, authorize him to temporarily take charge of the property of the defendant and to receive its premiums and other income until a final decree is rendered. (R. S. 1929, §5946. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6058. *Title of assets to vest in superintendent.*

Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets. (R. S. 1929, §5947.)

*Sec.* 6059. *Disposition of assets.*

If the court directs the superintendent of the insurance department to liquidate, settle or wind up the affairs of such company, said superintendent shall take immediate possession of the assets, books and papers of such company, and unless disposition of the assets of said company is made by a reinsurance agreement as may be provided by law, he shall sell and dispose of the real estate and other property of such company, subject to the approval of the court, and may execute in his own name, as superintendent of the insurance department, all necessary and proper conveyances of the same; he may also, in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state, or of the United States, relating to such company, its assets, liabilities and business. (R. S. 1929, §5948. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec. 6060. Allowance of demands—commissioners appointed.*

The court or judge in or before whom the case is pending, upon the application of said superintendent, shall limit and may extend the time for the presentation of claims against such company, and notice thereof shall be given in such manner as said court or judge shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of such company. Said court shall appoint one or not more than three disinterested persons as commissioners to receive and decide upon the claims presented against such company, who shall give notice of the times and places of their meeting for that purpose, in such manner as said court shall prescribe, and within one month after the expiration of the time so limited, shall file with the clerk of said court a list of the claims presented to them, specifying those allowed, the amount allowed and those disallowed (R. S. 1929, §5949.)

*Sec. 6061. Duties and powers of superintendent.*

If the court directs or orders the superintendent of the insurance department to rehabilitate an insurance company, upon the rendition of such an order, the title and right to possession of its books, papers, records, property and assets, of whatsoever kind or nature, shall immediately vest in and pass to the superintendent of the insurance department, and said superintendent shall forthwith proceed to conduct the business of such insurance company and take all proper steps to remove the causes and conditions which have made such proceedings necessary, subject, however, to the orders of the court. Said superintendent may, subject to the approval and direction of the court, sell and dispose of any of the property of such company, may borrow money on the security of such property, may execute in his own name as superintendent of the insurance department all necessary and proper

instruments and conveyances, and may also in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state or states of the United States relating to such company, its assets, business and liabilities. If at any time, in the opinion of the superintendent of the insurance department, a further continuance of the order of rehabilitation would be futile, he may apply to the court for an order to liquidate, settle or wind up the affairs of such company, or if at any time during the continuance of such order of rehabilitation the cause for any such order or like order has actually been removed, the superintendent of the insurance department or any interested person, upon due notice to such superintendent, may apply for an order terminating the proceedings and permitting such insurance company to resume title and possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court shall determine that the purpose or purposes of the proceedings have been fully accomplished. (R. S. 1929, §5950. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6062. *Distribution of assets.*

Unless reinsurance of a dissolved company is effected and its assets conveyed to the reinsuring company as provided by law, and unless such dissolved company is being rehabilitated under other sections of this article, the superintendent of the insurance department, under the direction of said court, shall apply the sums realized from the assets of such dissolved company, first, to payment of all the expenses of closing the business and disposing of the assets of such company; second, to the payment of all lawful taxes and debts due the state and the United States and the counties and municipalities of this state; third, to the payment of the death losses and matured policy claims; fourth, to the payment of the debts and claims allowed against such company, and the unearned premiums and

the surrender value of its policies, in proportion to their respective amounts; and lastly, any sums remaining in the hands of said superintendent, after the payments have been made in full as herein provided, shall be disposed of in such manner as said court shall order and direct: *Provided, however,* that if the company is a life insurance company, and has deposits for policyholders, or for the security of registered policies or annuity bonds, such deposits shall be disposed of as in this chapter is specially provided in respect to the same. And said court may make all orders and decrees necessary and proper in reference to the title, possession, disposition and distribution of all assets, and the allowance and satisfaction of claims against said company, and in any other matter relating to its affairs and business. In case of a conflict of interests on any matter, or concerning the enforcement or settlement of any conflicting claims between two or more dissolved insurance companies, the settlement and winding up of whose affairs shall be under the charge of the superintendent, it shall be the duty of said superintendent, and the right of any person interested in any of the said companies, to report the fact of conflict and the question or questions involved to the court in which any of the causes is pending, and such court shall thereupon have power to appoint a trustee, to have charge and control of the interests of any of said companies as regards the settlement or enforcement of its claims in respect to the matter in controversy, or to make such other orders providing for the settlement, adjustment or enforcement of the rights of said company in said matter as to the court shall seem best adapted to the protection of the rights of all; and *provided further,* that nothing in this section shall be construed to authorize a distribution of the assets of a company already dissolved, so that creditors whose right to a ratable distribution of the assets of said company which has been fixed and determined by such dissolution shall be deprived of such right. (R. S. 1929, §5951. Re-

enacted, Laws 1933, Ex. Sess., p. 65; Amended, Laws 1939, p. 457.)

*Sec.* 6063. *Superintendent to take charge of assets.*

Whenever, by this chapter, or by any other law of this state, the superintendent of the insurance department is authorized or required to take possession of the assets of any insurance company, any person or company who shall neglect or refuse to deliver to said superintendent, on his order or demand, any books, papers, evidences of title or debt, or any property belonging to any such company in its, his or their possession, or under his, its or their control, shall be punished by a fine of not more than ten thousand dollars, or if an individual, by imprisonment in the county jail for not exceeding two years, or in the penitentiary for not exceeding three years, or by both said fine and imprisonment. (R. S. 1929, §5952.)

*Sec.* 6064. *Reinsurance of dissolved companies.*

Whenever any decree enjoining a company perpetually from further prosecution of its business or judgment of dissolution is rendered or granted under the provisions of this article, the superintendent of the insurance department may make or cause to be made, a report verified by affidavit, showing the actual condition of such company. Whenever such report shall show facts warranting, in the opinion of the superintendent of the insurance department, the reinsurance of the risks of such company, then, subject to the approval and direction of the court said superintendent shall proceed to reinsure such risks on the best terms obtainable for all persons interested. (R. S. 1929, §5953. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec. 6065. Payment of expenses of proceedings.*

In proceedings to enjoin, rehabilitate, dissolve, wind up or otherwise settle the affairs, and dispose of the assets of insurance companies, the superintendent of the insurance department shall receive no fees nor compensation for any services personally performed by him. He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, and the expenses of such employment, together with all necessary expenses in the settlement of the business of the company, or the collection, disposition or distribution of its assets shall be taxed as costs, and paid by the superintendent out of the assets of such company; or, in case it is reinsured, by the reinsuring company, or if the company proceeded against has no assets, then as by law in such cases provided, to the persons doing the work and rendering the service. The superintendent shall keep a full account of all receipts and disbursements, and make report of the same to the court having jurisdiction thereof at least once in twelve months, and oftener if required by the court and shall be responsible on his official bond for all assets coming into his possession. The court may, in its discretion, require of the superintendent a bond in addition to his official bond. (R. S. 1929, §5954. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec. 6066. Receivers' reports.*

In all cases where, under the provisions of the laws of this state, insurance companies have been heretofore or shall hereafter be dissolved and placed in the hands or charge of a receiver or receivers, or persons other than the superintendent, by decree of court or operation of this law, it shall be the duty of such receiver or receivers or persons to make full and complete itemized re-

ports, under oath, to the superintendent of the insurance department of all receipts and disbursements, and of the condition and affairs of the company or companies under their charge; such reports shall be made once in every three months; the first report made under this law shall be brought down to the first day of October, 1879, and shall embrace an itemized statement of all receipts and disbursements, and of all property and assets then on hand, and account for all on hand from the date of the appointment of such receiver until the date of such report; it shall be filed with the said superintendent on or before the fifteenth day of October, 1879; in case any receiver or receivers or persons shall fail to make such report within the time aforesaid, or to make any regular report as above required, the court, on motion of the superintendent, shall compel the same to be done. (R. S. 1929, §5955.)

*Sec.* 6067. *Superintendent to have access to books, etc.*

The superintendent may, at any time, have access to the books and papers of any receiver or other trustees, heretofore or hereafter appointed, for the purpose of examining his accounts, and may at any time be heard in person or by counsel on any matter affecting the administration of the affairs of such receiver or trustees. (R. S. 1929, §5956.)

*Sec.* 6068. *Removal of receivers.*

If any receiver or trustee heretofore appointed, and now charged with the winding up of the affairs of any insurance company, dies, resigns or is removed, the court shall thereupon turn the administration of its affairs over to and vest the title to all its property undisposed of in the superintendent of the insurance department, as by this chapter is provided in case of the dissolution of an insurance company; and thereupon said company's affairs and assets shall be disposed of in the same manner as in

this chapter provided. In the settlement of the affairs of insurance companies already dissolved and in the hands of the courts by its receivers the court shall, as far as possible, conform to and be governed by the provisions of this law. (R. S. 1929, §5957.)

*Sec.* 6069. *Final settlement of receivers.*

It shall be the duty of every receiver heretofore appointed and now in charge of the affairs of any insolvent company, and of the superintendent of the insurance department, when charged with the winding up of the affairs of any such company, to make, at least twice a year, to the court in which the cause is pending, and oftener, if the court shall so order, a full report, under oath, of the condition and affairs of such company; and if it shall appear to the court from such report that, after reserving an amount sufficient to pay the probable expense of winding up said company, there shall remain in the hands of such receiver or superintendent enough cash to pay at least ten per cent of the allowed claims, the court may order the same to be distributed according to the rights of the claimants. The superintendent and every such receiver shall make final distribution of the assets and final settlement of the affairs of each insolvent company, now or hereafter in his charge, and settlement of his accounts within the shortest time practicable, in no case to exceed three years from the date at which said company has been or shall be dissolved: *Provided,* that the court may, for good cause, extend the time for such final settlement, not more than two years. For the purpose of making final settlement the superintendent or receiver shall, at least three months before making the same, convert into money all assets remaining undisposed of, and distribute the same among those entitled thereto, under the order of the court. If, thirty days after such final settlement and distribution, any such receiver shall have in his hands any moneys unpaid or unclaimed, he shall pay the

same over to the superintendent of the insurance department, and if such moneys are not paid, or claimed by the parties entitled thereto, within one year thereafter, the same, as well as any such fund so remaining in the hands of the superintendent after like final settlement and distribution by him of the assets of any company in his hands, shall be paid into the state treasury, and held and disposed of as provided by law for escheats. Notice of such final settlement shall be given by publication in some newspaper published in the city or county in which such proceedings are pending, for at least four weeks prior thereto. (R. S. 1929, §5958.)

## APPENDIX II.

### Provisions of Missouri Insurance Code Relating to Reciprocal Insurance Associations from Revised Statutes of Missouri, 1939.

ARTICLE 11, CHAPTER 37.

INTER-INDEMNITY CONTRACTS--RECIPROCAL OR INTER-INSURANCE CONTRACTS.

*Sec.* 6078. *Inter-indemnity contracts authorized.*

Individuals, partnerships and corporations of this state, hereby designated subscribers, are hereby authorized to exchange recriprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance.

*Sec.* 6079. *To be executed through attorney in fact.*

Such contracts may be executed by an attorney in fact herein designated attorney, duly authorized and acting for such subscribers and such attorney may be a corporation. The office or officers of such attorney herein defined as an exchange, may be maintained at such place or places as may be designated by the subscribers in the power of attorney.

*Sec.* 6080. *Application for licenses - requirements, etc.*

Such subscribers so contracting among themselves shall, through their attorney, file with the superintendent of insurance of this state, a declaration verified by the oath of such attorney setting forth:

(a) The name or title of the office at which such subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization or by any insurance corporation or association as in the opinion of the superintendent of insurance is calculated to result in confusion or deception.

(b) The kind or kinds of insurance to be effected or exchanged.

(c) A copy of the form of policy contract or agreement under or by which such insurance is to be effected or exchanged.

(d) A copy of the form of power of attorney or other authority of such attorney under which such insurance is to be effected or exchanged.

(e) The location of the office or offices from which such contracts or agreements are to be issued.

(f) That except as to the kinds of insurance hereinafter specifically mentioned in this subdivision, applications have been made for indemnity upon at least one hundred separate risks aggregating not less than one and one-half million ($1,500,000.00) dollars represented by executed contracts or *bona fide* applications to become concurrently effective. In the case of employer's liability or workmen's compensation insurance, applications shall have been made for indemnity upon at least one hundred separate risks covering a total pay roll of not less than two and one-half million ($2,500,000.00) dollars as represented by executed contracts or *bona fide* applications to become concurrently effective. In the case of automobile insurance applications shall have been made for indemnity upon at least one thousand motor vehicles or for insurance aggregating not less than one and one-half million ($1,500,000.00) dollars represented by executed contracts or *bona fide* applications to become concurrently effective on any or all classes of automobile insurance effected by said subscribers through said attorney.

(g) That there is in the possession of such attorney and available for the payment of losses, assets conforming to the requirements of section 6083 hereof.

*Sec. 6081. Superintendent of insurance to be authorized to accept service of legal process.*

Concurrently with the filing of the declaration provided for by the terms of section 6080, the attorney shall file with the superintendent of insurance an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificate of authority provided for in section 6087, service of process may be had upon the superintendent of insurance in all suits in this state arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the superintendent of insurance shall file one copy, forward one copy to said attorney, and return one copy with his admission of service.

*Sec. 6082. Statement of condition and affairs may be required to be filed by superintendent - restriction on liability of members.*

There shall be filed with the superintendent of insurance of this state, by such attorney, a statement under the oath of such attorney, showing in the case of fire insurance, the maximum amount of indemnity upon any single risk and such attorney shall whenever and as often as the same shall be required, file with the superintendent of insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers and that from such examination or from other information in his possession, it appears that no subscriber has assumed on any single fire insurance risk an amount

greater than ten per centum of the net worth of such subscriber.

*Sec.* 6083. *Reserves required - nature and amount guarantee funds - funds deposited to make up deficiency, how disposed of.*

There shall be maintained at all times assets in cash or securities authorized by the laws of the state in which the principal office of the attorney is located for the investment of similar funds of insurance companies doing the same kind of business, in amount equal to fifty per centum of the net annual advance premiums or deposits collected and credited to the accounts of subscribers on policies having one year or less to run and *pro rata* on those for longer periods; or, in lieu thereof, one hundred per centum of the net unearned premiums or deposits collected and credited to the accounts of subscribers. Said assets shall not be charged as a liability. There shall also be maintained as a guaranty fund or surplus, an additional sum in cash or such securities amounting to not less than one hundred thousand ($100,000.00) dollars in the case of employer's liability or workmen's compensation insurance and not less than fifty thousand ($50,000.00) dollars for all other kinds of insurance. In addition to the foregoing requirements in the case of employer's liability, public liability, workmen's compensation and automobile insurance there shall be maintained as a claim or loss reserve in cash or such securities, assets sufficient to discharge all liabilities on all outstanding losses arising under policies issued, the same to be calculated in accordance with the laws of the state relating to similar reserves for companies insuring similar risks. If at any time the amounts on hand are less than the foregoing requirements, the subscribers or their attorney for them shall make up the deficiency: *Provided however*, that the guaranty fund or surplus requirements of this section, shall not apply to exchanges which are licensed on or before the date when this section shall become effective until January 1, 1923;

but such exchanges shall nevertheless maintain the assets first hereinabove provided for and also the claim and loss reserves as specified; and whenever as to such exchanges said assets and reserves are less than twenty-five thousand ($25,000.00) dollars, plus such reserves, whichever is the greater, the subscribers or their attorney for them shall make up the deficiency. Net premiums or deposits as used in this law shall be construed to mean the advance premiums or deposits made by subscribers after deducting therefrom the amounts specifically provided in subscribers' agreements for expenses. Where funds other than those which have accrued from premiums or deposits of subscribers are supplied to make up a deficiency as herein provided for, same shall be deposited and held for the benefit of subscribers under such terms and conditions as the superintendent of insurance may require so long as a deficiency exists, thereafter to be returned to the depositors.

*Sec.* 6084. *Annual statement of financial condition required.*

Such attorney shall make an annual report to the superintendent of insurance for such calendar year, showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers and the amounts retained for expenses: *Provided, however,* that such attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of said, reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by the superintendent of insurance, as often as he sees fit and the cost thereof shall be paid by the exchange examined.

*Sec.* 6085. *Corporations generally empowered to become subscribers.*

Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contract of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred.

*Sec.* 6086. *Penalty for acting without legal authority - superintendent authorized to issue temporary permit.*

Any attorney who shall exchange any contracts of indemnity of the kind and character specified in this article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars: *Provided, however,* that the superintendent of insurance may, in his discretion and on such terms as he may prescribe, issue a permit for organization purposes, such permit to continue in force or be cancelled at the pleasure of the superintendent of insurance.

*Sec.* 6087. *Certificate of authority from superintendent of insurance required - license may be revoked or suspended.*

Each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to in this article shall procure from the superintendent of insurance annually a certificate of authority, stating that all of the requirements of this article have been complied with, and upon such compliance and the payment of the fees required by this article, the super-

intendent of insurance shall issue such certificate of authority. The superintendent of insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this article after reasonable notice has been given said attorney, in writing, so that he may appear and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder may renew same annually thereafter: *Provided, however,* that any certificate of authority shall continue in full force and effect until the new certificate of authority be issued or specifically refused.

*Sec.* 6088. *License fee.*

Such attorney shall pay as a fee for the issuance of the certificate of authority herein provided for, the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatever character in this state.

*Sec.* 6089. *Exemption from other insurance laws except retaliatory law.*

Except as herein provided no law of this state relating to insurance shall apply to the exchange of such indemnity contracts: *Provided, however,* that the provisions of the retaliatory law shall apply.

## APPENDIX III.

**Form of Power of Attorney Used by Subscribers at Manufacturing Lumbermen's Underwriters with Modification of May 1, 1933. From (Good-Norman) Report of Audit of October 19, 1937, p. 112 (Original Exhibits on File with Clerk).**

### APPLICATION FOR INSURANCE

MANUFACTURING LUMBERMEN'S UNDERWRITERS

1. We hereby make application to become a subscriber of Manufacturing Lumbermen's Underwriters, desiring to exchange indemnity with other subscribers with separate and limited liability.

2. NOW, THEREFORE, the undersigned as a subscriber of Manufacturing Lumbermen's Underwriters hereby appoint Rankin-Benedict Underwriting Company of Kansas City, Missouri, Attorney-in-fact for us and in our name, place and stead, to exchange indemnity with such other subscribers; to accept and make binding upon us applications from such subscribers for the exchange of such indemnity; to make, issue, subscribe, deliver, amend, modify, change, reinsure and cancel contracts therefor, containing such terms, clauses, warranties, conditions and agreements as our said Attorney shall deem proper; to perform or waive any agreements or stipulations of any such contracts; to give, receive and waive any notices or proofs of loss; to adjust, settle and pay all losses and claims under any such contract or other evidence of indemnity; to demand, collect, receive and receipt for all moneys due to or from us in connection with the exchange of indemnity herein authorized and to disburse same within the authority herein conferred; to appear for us in any suit, action or legal proceedings, and to institute, prosecute, defend, compromise or settle any suit, action or other legal proceeding or any claim that may arise out of any such contract; to do any and all things which in

the judgment of said Attorney may be necessary and proper for the protection of our interests in regard to any such contracts; and to do or perform any other or different acts that we ourselves could do in relation to any contract herein authorized.

3. Said Attorney is hereby specifically authorized for us and in our name to execute any and all documents and to do and perform all other acts which are now or may hereafter become necessary or advisable to effect compliance under the laws of any state concerning the exchange of indemnity contracts herein provided for, hereby confirming and adopting as binding upon us all appointments for service of process heretofore made.

4. The intent and purpose of this instrument is to clothe said Attorney with the power necessary to enable us through it to exchange indemnity with other subscribers; provided, however, that said Attorney shall have no power to make us jointly liable with any other subscriber, and every liability of whatever nature it is authorized to incur for us hereunder shall be in every case several and not joint.

5. There shall be no joint funds, but a separate, individual account shall be kept by our Attorney for us and for each subscriber, and all accounts shall be open at any time for inspection by either ourselves or the Advisory Committee.

6. Said Attorney shall not bind us on any one risk for an amount in excess of our annual premium deposits.

7. As compensation for the services to be performed hereunder, said Attorney shall be entitled to twenty per cent of all premium deposits made by us, and shall defray all expenses incident to the exchange of indemnity hereby authorized, except taxes, license fees, legal, reinsurance and brokerage expenses, expenses of adjustments (when made by independent adjusters), and ex-

penses incurred by the Advisory Committee, of which our account shall bear its pro rata share.

8. Advisory Committee composed of not less than seven subscribers shall be elected annually for a term expiring on the first Tuesday in December of each year, and in annually choosing successors our Attorney shall select a list to be voted upon, which list shall be approved by the then Advisory Committee and submitted to all subscribers for their vote on or before November 1st of each year. If the nominees so selected do not meet the approval of the subscribers, they may nominate a committee upon the signatures of ten per cent of all the subscribers and submit such list to the Attorney, who shall submit both lists to all subscribers for vote, and the seven nominees (or the number then constituting the committee) receiving the largest number of votes shall be declared elected. If any member of said committee shall cease to exchange indemnity with other subscribers, or if his power of attorney shall be revoked or cancelled, he shall cease to be a member of the committee. Said committee shall serve until their successors are chosen, any vacancies occurring in said committee to be filled by the remaining members until the following election.

9. In the government of said exchange of indemnity and in defining the duties of said Attorney, the Advisory Committee may adopt such rules and regulations as they may deem best, providing such rules and regulations do not conflict with any of the terms of this instrument.

10. Our said Attorney, with the approval of the Advisory Committee, shall have the power to assess us to an amount not exceeding the sum of our annual premium deposits to protect outstanding obligations created pursuant to this instrument, and we hereby agree to pay such assessment.

11. The Advisory Committee shall select a trustee, said trustee to be a trust company with a capital stock of at least one million dollars and a resident of Kansas City,

Missouri. All moneys belonging to us that may come into the hands of our Attorney shall be turned over to said Trustee, who shall thereupon pay to said Attorney the sums provided for under the terms of paragraph 7 hereof. The remaining portion of said funds shall be held by said trustee for us as our individual funds and shall be deposited by said trustee in such depositories or invested in such securities as may be approved by said Advisory Committee. All such funds so deposited by the trustee shall be deposited to the joint account of our Attorney and said trustee, and all withdrawals from such fund shall be by check signed by said Attorney and countersigned by said Trustee.

12. Our said Attorney shall give bond to said trustee for the safety of funds while in the possession of said Attorney in such sum as said Committee shall require.

13. In the event said Attorney shall fail or refuse to discharge its duties hereunder in a manner satisfactory to the Advisory Committee, said Committee upon a three-fourth vote may designate temporarily a substitute Attorney to act in its place and stead, and in said event said substitute Attorney shall be clothed with all the powers and duties hereby conferred on said Attorney.

14. The Advisory Committee shall set aside out of our savings a net surplus equal to twice the amount of our annual deposits and all other savings shall be returned to us annually in cash. It is provided, however, that said Committee may at their option authorize the return of a percentage of our savings before the full amount of such surplus fund has been accumulated. If policies hereunder are issued through brokers or at a deviated premium deposit, the foregoing provisions of this paragraph and the provisions of paragraphs five and ten do not apply to these policies.

15. In the event any contract of indemnity herein provided for shall be cancelled by our said Attorney an appeal may be had to the Advisory Committee, and if

said Committee shall decide that said contract should not have been cancelled the same shall be reinstated.

16. In the event any sum to be paid by us for current indemnity hereunder shall not be paid within thirty days after issuance of contract of indemnity to us, same shall bear interest at the rate of six per cent until paid, and in the event same shall not be fully paid within four months after the date of issuance of such contract, then failure to make such payment shall operate as a cancellation of such contract.

17. All books, files, surveys and other documents and instruments accumulated through the exchange of the indemnity herein provided for shall be considered as incident thereto and shall pass to the use and benefit of any and all succeeding Attorneys, without charge or cost to said succeeding Attorneys.

18. Said Attorney agrees that as a part of its duties to be performed it shall cause inspections to be made each year of all the lumber manufacturing properties covered by contracts of indemnity issued hereunder; provided, however, that an inspection of any such property may be omitted where unusual or extraordinary conditions beyond the control of said Attorney shall exist.

19. This instrument may be revoked or cancelled at any time by either party giving to the other party five days' notice in writing, and thereupon our Attorney shall cancel all unexpired indemnity exchanged by us through it and within thirty days return to us any funds belonging to us, including any net surplus to our credit.

20. The personal pronoun used to refer to the subscriber or Attorney shall apply regardless of number or gender.

IN WITNESS WHEREOF we have hereunto set our hand and seal this_____day of_____19_____, at_____

Witness: _____

By _____

(3)

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 493.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

## BRIEF FOR R. E. O'MALLEY, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI.

JAMES P. AYLWARD,
RALPH M. RUSSELL,
Kansas City, Missouri,
*Counsel for Respondent, R. E. O'Malley.*

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A.

### OPINIONS DELIVERED IN THE COURT BELOW.

The opinion of the Supreme Court of Missouri, *Lucas, Superintendent of Insurance Department,* v. *Manufacturing Lumbermen's Underwriters et al.* (not yet officially reported), is reported in 163 S. W. 2d 750, 761 (R. 1339-1358).

B.

## JURISDICTION.

The jurisdiction of this Court is invoked by Petitioner under Section 237 of the Judicial Code (43 Stat. 937), 28 U. S. C. A., Sec. 344. The date of the judgment of the Supreme Court of Missouri sought to be reviewed was May 5, 1942 (R. 1339-1358). Motion for rehearing was overruled June 17, 1942 (R. 1403). Motion to transfer to the Court *en banc* was denied July 28, 1942 (R. 1472).

C.

## STATEMENT OF THE CASE.

R. E. O'Malley, then Superintendent of the Missouri Insurance Department, on November 12, 1936, took charge of the affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange. (Respondent will hereafter refer to "Manufacturing Lumbermen's Underwriters" as "M. L. U.")

M. L. U. was organized and doing business under the provisions of Article 11 of Chapter 37, Revised Statutes of Missouri, 1939 (Sections 6078-6089, Revised Statutes of Missouri, 1939, inclusive), and having its principal office at Kansas City, Missouri. Rankin-Benedict Underwriting Company, a corporation, was attorney-in-fact for this exchange.

The proceeding was commenced against the exchange and its attorney-in-fact pursuant to provisions of Sections 6052 to 6069, Revised Statutes of Missouri, 1939, inclusive, and O'Malley was authorized by the Court, under Sec. 6057, R. S. Mo., 1939, to temporarily take charge of the exchange's property and receive its premiums and other income until final decree (R. 5). The proceeding was resisted vigorously. After a trial and on April 1, 1937, pursuant to the provisions of Secs. 6056 and 6058, R. S. Mo., 1939, a final decree was entered, dissolving the ex-

change and vesting title to its assets in fee simple in O'Malley, as Superintendent, for the use and benefit of the Exchange's creditors, subscribers and policyholders, and others interested (R. 38-40).

Later, on August 14, 1937, finding that the exchange could not be rehabilitated or reinsured, as authorized by Secs. 6059 to 6065, R. S. Mo., 1939, O'Malley, under Sec. 6061, R. S. Mo., 1939, applied for and the Court granted an order to liquidate the exchange.

O'Malley continued in charge until October 20, 1937, when he was succeeded by George A. S. Robertson as Superintendent. O'Malley's accounting covered the entire period he was in charge; that is, under the temporary order from November 12, 1936, to April 1, 1937; under the final decree from April 1, 1937, until order of liquidation, August 14, 1937, and from August 14, 1937, to October 20, 1937. During the time O'Malley was temporarily in charge, and prior to the final decree of dissolution on April 1, 1937, he attempted to maintain the *status quo* of the concern. Orders were obtained (R. 6, 7, 8), authorizing O'Malley to pay such ordinary expenses, including traveling expenses, postage, telegraph and telephone and usual operating expenses, as should be determined by said O'Malley.

Upon the filing of O'Malley's final accounting, exceptions were filed by Robertson, then Superintendent. After a hearing upon said exceptions, O'Malley was surcharged in the amount of $85,264.44. The trial court thereupon entered a judgment against O'Malley and his surety, The Central Surety and Insurance Corporation. From that judgment two separate appeals were taken. Those appeals were consolidated in the Supreme Court of the State of Missouri, and the judgment reversed.

Petitioner's statement omits many pertinent facts and contains many conclusions not warranted by the facts in the record. While stating that the association in liquidation is "an association of individual subscribers to ex-

change indemnity on a reciprocal plan through a common attorney-in-fact, acting under the provisions and limitations of the power of attorney executed by the subscribers," petitioner omits the statement that the association in liquidation, besides being such an entity as described by petitioner, is an association of individual subscribers engaged through an attorney-in-fact *in issuing* as an insuring entity *standard fire insurance policies* to persons who were not subscribers or members of the association. It is admitted that such contracts would be binding on the subscribers (R. 155). The power of attorney, Appendix of petitioner's brief (Paragraph 14), recognizes that such policies were issued. Petitioner designates the holders of standard fire policies as "non-participating, non-assessable subscribers."

The statement by petitioner that the rights of subscribers, as well as other creditors and holders of standard fire policies, were governed only by the powers of attorney executed, is merely a conclusion and erroneous. The statement that the expenditures were made from "individual trust funds" of subscribers is unfounded. The expenditures were made from all of the assets of M. L. U., coming to O'Malley as Superintendent on November 12, 1936. The statement of petitioner infers that the surcharge was made for the period when O'Malley was *temporarily in charge*. It was not. The surcharge covered the period beginning November 12, 1936, and ending August 16, 1937, continuing through two phases of the litigation; first, that period beginning November 12, 1936, and ending April 1, 1937, when O'Malley was attempting to maintain the *status quo* of the exchange, though hampered by defendants in the state court action and by two bankruptcy suits;* and through that period beginning April 1, 1937, and ending August 16, 1937,

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**In re Manufacturing Lumbermen's Underwriters*, (D. C. Mo.) 18 F. Supp. 114; *In re Manufacturing Lumbermen's Underwriters*, (D. C. Mo.) 46 F. Supp. 343.

during which period the M. L. U. had been dissolved and all of its assets vested in O'Malley.

The statement that the trial court found "that, without notice or hearing to the subscribers, the respondent O'Malley, while in charge of the association, misspent over $85,000 of moneys belonging to the subscribers" is erroneous. A reference to the record (pages 105-112) discloses no such finding by the trial court. The findings were:

(R. 105), that O'Malley was not authorized to reinsure or rehabilitate M. L. U.;

(R. 106), that he expended the sums without any legal authority, that they were exorbitant, unreasonable and never approved by the Court, that the expenses were not necessary for the settlement of the business of M. L. U.;

(R. 107), that he was entitled to credit on his final accounting for all sums found to have been reasonable and necessary in the handling and settlement of the business of M. L. U.;

(R. 107), that he be surcharged for all sums unreasonably spent and not necessary for the business of handling and settling the business of M. L. U.; and

(R. 109), that the expenditure of the sum of $85,-264.44 was not necessary, lawful, or of benefit to the settlement of M. L. U. The first claim that there was no notice or hearing to the subscribers came on motion for rehearing filed in the Supreme Court of the State of Missouri.

## D.

## STATUTES INVOLVED.

The statutes involved are Secs. 6052 to 6069, inclusive, R. S. Mo., 1939. They are set out in full hereafter in Appendix to this brief.

E.

## QUESTIONS PRESENTED.

While no questions are specifically brought forward in the petition under the heading "Questions Presented," petitioner, in his accompanying brief and in the petition under the heading entitled "Reasons for Allowance of Writ," raises two questions:

(1) Are Secs. 6052 to 6059, R. S. Mo., 1939, unconstitutional in that they deprive subscribers to a reciprocal exchange of their property without due process of law, in violation of Amendment XIV of the Amendments to the Constitution of the United States, by delegating power to the Superintendent to expend sums of the exchange necessary while in liquidation?

(2) Do Secs. 6052 to 6059, R. S. Mo., 1939, impair the obligation of contract of subscribers to a reciprocal exchange in violation of Section 10, Article I, Clause 1, Articles of the United States Constitution, by delegating the power of the Superintendent to expend sums necessary for the liquidation of the exchange?

F.

## SUMMARY OF THE ARGUMENT.

### POINT I.

The petition does not conform to Rule 38, Paragraph 2, of this court, for the reason that the petition fails to contain a statement, particularly disclosing the basis upon which it is contended that this court has jurisdiction (Rule 12, Paragraph 1).

### POINT II.

The petition does not contain "Questions Presented," therefore, no question is specifically brought forward by the petition for writ of certiorari which can or will be

considered by this Court. This Court will not consider a question not specifically brought forward by petition for the writ.

POINT III.

Edward L. Scheufler, present Superintendent of the Insurance Department of the State of Missouri, a state officer, challenges the constitutionality of Secs. 6052 to 6059 of the Missouri Insurance Code in the light of the due process clause and in the light of the contract clause of the Federal Constitution (Petition p. 9). He cannot assert the constitutionality of these statutes to maintain his position in this Court and assail their constitutionality. His challenge to the constitutionality of the state statutes does not present a federal question, but is merely one of local law. He, as a state officer, has no personal interest in this litigation by which he may challenge the constitutionality of the acts involved.

POINT IV.

The constitutional questions sought to be presented to this court are too indefinite, vague and uncertain, merely referring to "the due process clause" and "the contract clause" of the Federal Constitution.

POINT V.

No substantial federal question is presented in this case.

(1) The question of the jurisdiction of this Court upon such frivolous attempts to raise constitutional questions has been foreclosed.

(2) The attempted constitutional questions were not timely raised. The contention was first made in motion for rehearing in the Supreme Court of the State of Missouri that the subscribers were deprived of their property without due process of law. Such question could have

been raised by the exceptions to O'Malley's report (R. 59, 67); by the amended petition of Vincent B. Coates, substitute attorney-in-fact (R. 28-38); by the exceptions to O'Malley's supplemental report (R. 90-97); by the stipulation limiting exceptions to O'Malley's final report (R. 99, 103).

(3) The contentions of petitioner have been foreclosed by final judgment of the trial court, rendered April 1, 1937, disposing of the "trust fund theory" regarding the assets of M. L. U.; such judgment is *res judicata* as to the petitioner.

(4) There was no federal question involved in the Supreme Court of Missouri; no federal question was decided; the opinion was founded upon adequate questions of local law; the opinion and judgment of the Supreme Court of Missouri to which certiorari is sought is a construction by the highest court of the state of the statutes of that state and is not reviewable by this court.

## G.

## ARGUMENT.

### POINT I.

**The petition does not conform to Paragraph 2 of Rule 38 of this Court, in that it fails to contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction as provided in Paragraph 1 of Rule 12 of this Court.**

The petition does not show, as required by Paragraph 1 of Rule 12, by a statement that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and does not cite cases to sustain the jurisdiction of this Court. It does not include a statement of the grounds upon which it is contended the questions involved are substantial; it does not specify the stage in the proceedings in the court of first instance or in an appellate court at which the federal questions sought to be reviewed were raised, the way in which they were passed upon by the court as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

This Court has repeatedly held that the provisions of this paragraph with appropriate record page references must be complied with when review of a state court judgment is sought by petition for certiorari, and has found that a failure to comply with these requirements will be sufficient reason for denying the petition. In *Furness Withy & Co. v. Yang-Tsze Insurance Assn.*, 242 U. S. 430, 61 L. Ed. 409, this Court stated (l. c. 434):

> "Such petitions (for certiorari) go first to every member of the court for examination, and are then separately considered in conference. * * * We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting

> briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity* and *clearness* whatever is essential to ready and adequate understanding of points requiring our attention the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket."

This insufficiency alone in the petition should require that it be dismissed.

## POINT II.

**No question is specifically brought forward by the petition for writ of certiorari which can or will be considered by this Court.**

The petition does not contain a paragraph as required by Rule 38, Paragraph 2, "The Questions Presented." The "Reasons for the Allowance of the Writ" contained in the petition, pages 9-11, and the "Summary of the Argument" in the supporting brief attempt to raise two questions. This Court, in *General Talking Pictures Corporation, v. Western Electric Co.*, 304 U. S. 175, 190, 82 L. Ed. 1273, 1282, held, l. c. 177-178:

> Our consideration of the case will be limited to the questions specifically brought forward by the petition. * * * A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. * * * Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought. The specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decisions on the matter involved."

It is somewhat difficult to determine, even taking the petition and brief together, whether or not petitioner challenges the actual constitutionality of the act, the statutes themselves, or whether they will attempt to challenge the construction placed upon the statutes by the Supreme Court of Missouri. Petitioner asserts (petition p. 9) that he, as the superintendent of the Insurance Department of the State of Missouri, an official, challenges the constitutionality of Secs. 6052 to 6069 of the Missouri Insurance Code. This was not the petitioner's contention in motion for rehearing in the Supreme Court of Missouri. The petitioner there asserted that the construction placed upon these sections by the Court rendered them unconstitutional. There was no direct attack upon the statutes. It would seem that there is more emphasis upon the former. See *Dickinson Industrial Site, Inc.*, v. *Percy Cowan*, 309 U. S. 382, 389, 84 L. Ed. 819, 825; *Gunning* v. *Cooley*, 281 U. S. 90, 98, 74 L. Ed. 720, 726; *Helvering* v. *Taylor*, 293 U. S. 507, 516, 79 L. Ed. 623, 630.

## POINT III.

**Edward L. Scheufler, present Superintendent of the Insurance Department of the State of Missouri, states** (Petition p. 9) **that he himself, as an official, challenges the constitutionality of Sections 6052 to 6059 of the Missouri Insurance Code, in the light of the due process clause and in the light of the contract clause of the Federal Constitution.**

It has been repeatedly held by this Court that a state officer who has no personal interest in the litigation can sustain no injury thereby, and has not such an interest as will entitle him to apply for writ of certiorari in this court on the ground of unconstitutionality of a state statute. *County Court of Braxton* v. *State of West Va. ex rel. Dillon*, 208 U. S. 192, 198, 52 L. Ed. 450, 452. There this Court said, l. c. 197:

> "The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state

> courts sustaining the act, and the interest must be of a personal, and not of an official nature."

Holding that the county court of Braxton County in a representative capacity had not such a personal interest as distinguished from an official interest as would entitle them to a review as to the state court's decision on the constitutionality of state statutes.

To the same effect is *Stewart* v. *City of K. C., Kansas,* 239 U. S. 14, 16, 60 L. Ed. 120, 121. This Court stated, l. c. 16:

> "Constituted by the laws of the state, he had attempted to resist one of its laws. Whether he may do so is purely a local question."

See also *Smith* v. *State of Indiana,* 191 U. S. 138, 150, 48 L. Ed. 125, 127; *Caffrey* v. *Territory of Okla.,* 177 U. S. 346, 349, 44 L. Ed. 799, 801.

## POINT IV.

**The constitutionality questions sought to be presented to this Court are indefinite, vague and uncertain, do not particularly specify the particular section of the Constitution of the United States claimed to be violated; such questions were not properly presented to the state court in a manner which would enable the state court to pass upon the same, so that this court could review the state court's action therein.**

*Harding* v. *People of the State of Ill.,* 196 U. S. 78, 88, 49 L. Ed. 394, 398.

*Capital City Dairy Co.* v. *Ohio, ex rel. Attorney General,* 183 U. S. 238, 249, 46 L. Ed. 171, 177.

## POINT V.

**There is no substantial federal question presented to this Court.**

(1) The question of the jurisdiction of this Court upon attempts to raise constitutional questions

with regard to denial of due process and impairment of the obligation of contract by insolvency proceedings against an insolvent insurance company or other institution affected with the public interest, has been foreclosed by decisions of this Court. In *Neblett* v. *Carpenter*, 305 U. S. 297, 305, 83 L. Ed. 182, 189, concerning various questions raised regarding the constitutionality of a California act, providing for the liquidation of insurance companies, that all of the holdings concerned matters of state law and amounted, at most, to alleged erroneous constructions of the state statutes by its own court of last resort, the Court said, l. c. 302:

> "Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions."

This Court will ordinarily adopt the construction of a state court upon its own statutes, where there is no evasion of a federal question by that court, *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 124, 83 L. Ed. 1134, 1147, particularly where the construction of the statute placed upon it by the state court has been adopted by the state officials charged with the administration of the act. Here, O'Malley had placed upon the statutes authorizing him to take charge of an insolvent insurance company the same construction placed upon the statutes by the Supreme Court of the State of Missouri. See *Doty* v. *Love*, 295 U. S. 64, 74, 79 L. Ed. 1303, 1310. This Court has repeatedly held that the business of insurance is impressed with the public interest. *Equitable Life Assur. Society* v. *Brown*, 187 U. S. 308, 315, 47 L. Ed. 190, 193; *Relfe* v. *Rundle*, 103 U. S. 222, 226, 26 L. Ed. 337, 339.

In the Relfe case, the Missouri Insurance Code of 1879 was under consideration. It was held that the Superintendent of the Missouri Insurance Department was an officer of the state, representing the state in its sovereignty, while performing its public duties connected

with the winding up of its affairs with one of its insolvent and dissolved corporations; that his authority did not come from a decree of the court but from the statute. It was held that he represented all of the creditors, policyholders and persons interested, was entitled to hold and dispose of the property of the dissolved corporation in trust for the use and benefit of creditors and other parties interested. See also *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 434, 58 L. Ed. 1011, 1030.

(2) The attempted constitutional questions were not timely raised. The contentions were first made in motion for rehearing in the state supreme court that the subscribers were deprived of property without due process of law, and that the construction placed upon the statutes by the court rendered them unconstitutional. Such questions certainly were not raised at the earliest opportunity. They could have been raised by the exceptions to O'Malley's report (R. 59, 67), to his supplemental report (R. 90, 97), in the stipulation limiting the exceptions (R. 99, 103), and, while the "trust fund theory" was raised by the answer of Vincent B. Coates, substitute attorney-in-fact, who recited in the answer that he represented the subscribers (R. 28, 38), no constitutional question was raised. The decision of the court could have been anticipated and should have been anticipated by petitioner. While the rehabilitation section of the Insurance Code of Missouri perhaps had not been construed, similar sections in the Missouri Insurance Code had been repeatedly construed by the State Supreme Court, wherein that court had held that the insurance business, impressed with the public interest, was subject to strict regulation; that the administration of the Code was a duty of the Superintendent; and that the courts could not interfere with him in the administration of that Code. *State ex rel. Mo. State Life Ins. Co.* v. *Hall,* 330 Mo. 1107, 52 S. W. 2d 174; *State ex rel. St. Louis Mutual Life Ins. Co.* v. *Mulloy,* 330 Mo. 951, 52 S. W. 2d 469; *O'Malley* v. *Con-*

*tinental Life Ins. Co. et al.*, 343 Mo. 382, 121 S. W. 2d 834, l. c. 836; *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S. W. 2d 106; *State ex rel. Carwood Realty Co.* v. *Dinwiddie*, 343 Mo. 592, 122 S. W. 2d 912. By courts of other states: *Carpenter* v. *Pacific Mutual Ins. Co. of Calif.*, 74 Pac. 2d (Calif. 761); and by this court: *Relfe* v. *Rundle*, *supra*.

*In Herndon* v. *Georgia*, 295 U. S. 441, 455, 79 L. Ed. 1530, 1539, this Court stated the rule with regard to the time of raising federal questions in a state court, so as to confer appellate jurisdiction on this court, and, while stating that:

> "There is no doubt that the federal claim was timely, if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it,"

that situation certainly does not obtain here. The only theory upon which the decision of the state court could not have been anticipated was upon the theory that the successor Superintendent excepting to O'Malley's report and accounting should prevail upon all issues upon the appeal. Further, there is no substance to the constitutional claims. The business of insurance being impressed with the public interest, the statutes providing for the regulation of insurance companies became a part of the charter of the exchange, *Carpenter* v. *Pacific Mutual Life*, 74 Pac. 2d l. c. 774, 775 (affirmed); *Neblett* v. *Carpenter*, 305 U. S. 297, 305, 83 L. Ed. 182, 189, wherein it was held that neither the company (here subscribers) nor policyholders have the inviolate rights that characterize private contracts. The contract of each policyholder is subject to the state's police power. In *Ellerbe, Supt. of Ins.*, v. *United Masonic Benefit Association*, 114 Mo. 501, the Supreme Court of Missouri held that a liquidation statute was not a law impairing the obligation of a contract because of its making a different disposition of the insolvent company's assets than that provided for by the

certificates of insurance, since the law authorizing a company's existence became a part of its contracts and by such law the parties contracting with it agreed to be governed.

The subscribers to this exchange, executing their powers of attorney while statutory requirements were in effect regulating insurance companies, entered into an enterprise already regulated in the particular to which petitioner now objects. The subscribers executed the powers of attorney subject to further legislation upon the same topic. *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U. S. 32, 41, 84 L. Ed. 1061, 1067. The subscribers could not, by the execution of a power of attorney, divest the state of its right to assert its governmental authority in the exercise of its police power. *Penn. Hospital* v. *City of Philadelphia*, 245 U. S. 20, 24, 62 L. Ed. 124, 128. The subscribers were situated in the same position as any other creditor or policyholder, and were entitled, at most, to a ratable distribution of the assets after proper expenditures necessary to obtain liquidation. *Clark* v. *Williard*, 292 U. S. 112, 138, 78 L. Ed. 1160, 1175.

(3) Petitioner's theory advanced here that the assets of M. L. U. represented by the contributions of the subscribers became a trust fund for the subscribers was advanced by Vincent B. Coates, substitute attorney-in-fact *prior to* the decree of dissolution entered on April 1, 1937, asserting in his answer (Paragraph XI, XII, XIII, R. 31, 35) that any fact subscribers were entitled to a preference, that the assets of M. L. U. be subdivided to preserve the "trust fund." The court in its order of dissolution and injunction, entered on April 1, 1937, found against that contention and dissolved the association and enjoined the association, the attorney-in-fact and *the subscribers* from further engaging in business. A judgment as to this contention is *res judicata*. No appeal was taken and this matter could not be reasserted in a motion for rehearing in the state court or presented to this court.

(4) The decision of the state court in construction of its own statutes is a matter of local law and not federal law, and a mere erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 274, 71 L. Ed. 639, 642. The Constitution does not guarantee freedom from an erroneous decision of the state court. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 300, 82 L. Ed. 268, 276. The decision of the Supreme Court of the State of Missouri is in full conformity with all of its prior decisions and with decisions of this Court.

**Conclusion.**

Petition for certiorari should be denied for failure to comply with the rules of this Court; for the reason that no substantial federal question is properly before this Court; and for the reason that petitioner has no personal interest in the decision.

Respectfully submitted,

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RALPH M. RUSSELL,
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*R. E. O'Malley.*

## APPENDIX.

### Provisions of the Missouri Insurance Code Involved Revised Statutes of Missouri, 1939, Volume I, Pages 1524, 1529.

*Sec.* 6052. *Proceedings to wind up companies.*

Whenever it shall appear to the superintendent of the insurance department, from any examination made by himself, or from the report of a person or persons appointed by him, or from the statements of the company, or from any knowledge or information in his possession, (1) that the capital stock or guarantee fund of any company heretofore or hereafter incorporated or organized under the laws of this state doing in this state any kind of an insurance business is impaired, or (2) that such company is insolvent, or (3) that such company has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent or his deputy or his examiner, or (4) that such company has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction, the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, assocation, society, order, partnership or individual without first having obtained the written approval of the superintendent of insurance as provided by law, or (5) that such company is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders or to its creditors or to the public, or (6) that such company has willfully violated its charter provisions or any other law of the state, or (7) that such company has an officer who has refused to be examined under oath touching its affairs, or (8) that such company is organized under Ar-

ticles 2, 3, 4, 5, 6, 7, 8 or 11 of this chapter and is found to be in such condition after examination that it could not meet the requirements for incorporation and authorization specified in the law under which it was incorporated or is doing business, or (9), that such company has ceased to transact the business of insurance for a period of one year, said superintendent may institute a suit or proceedings in the circuit court in the county or city in which such company was organized or in which it has or last had its principal or chief office or place of business or in the county of Cole, to enjoin said company from further prosecution of its business, either temporarily or perpetually, or for a judgment dissolving such corporation or for both; and after the entry of such decree or judgment, the court upon the motion of the superintendent of the insurance department may order the liquidation, settlement and winding up of the affairs of such company or the rehabilitation of such company as provided in this chapter, together with such other decrees and orders in connection therewith as the court shall deem advisable. (R. S. 1929, §5941. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6053. *Manner of commencing suit.*

Such suit shall be commenced by filing a petition in the name of the superintendent of the insurance department of this state, as plaintiff, against the company, proceeded against as defendant, and said petition shall contain a brief statement of the condition of the company proceeded against, or of the causes upon which the proceeding is based; it may also contain a prayer for temporary or permanent injunction, or for both, and shall conclude with a prayer for general relief, under which prayer the court may grant any relief or issue any injunction or writ, and make any decrees or orders, under and within the provisions of this chapter, as shall be found advisable or necessary. (R. S. 1929, §5942.)

*Sec. 6054. Of the issuing, service and return of process.*

Upon the filing of such petition, the clerk of the court shall forthwith, and of course, issue a summons, requiring the defendant to appear before the court, if it be in session, or before any judge thereof, if the court has either adjourned for the term or to a day beyond three days from the date of issue of said summons, and to answer the petition on the return day of said summons. Said summons shall be returnable in three days after its issue, and shall be served as provided by law for service of process upon corporations in civil cases. If an injunction is prayed for, the petition shall be presented to the circuit court, or judge thereof, and the court or judge to whom it is presented shall thereupon make an order for the issuing of an injunction, providing its term and fixing the return day of the summons, which shall not exceed three days ftom its date; and upon such order being made, the petition shall thereupon be filed in the clerk's office, and the writ of injunction shall issue, together with the summons as above provided. Any writ of injunction issued under this law may be served and enforced as provided by law in injunctions issued in other cases, but the superintendent of the insurance department shall not be required to give any bond as preliminary to or in the course of any proceedings to which he is a party as such superintendent, under this chapter, either for costs or for any injunction, or in case of appeal to either the supreme court or to any appellate tribunal. If the first summons issued be not served, then other summons may issue, returnable as the court or judge may direct; or the court or judge to whom said petition has been presented, or who has jurisdiction of the case, when satisfied by the affidavit of the superintendent, or of any other person, either when the petition is first presented or afterward, or on return of any summons unserved, that for any cause personal service cannot be made on said company within the three days, may order the company proceeded against to be notified of the institu-

tion of the suit, its nature, and of the return day of the summons, which in such case shall not be less than fifteen nor more than twenty-three days from the date thereof; and thereupon the clerk shall cause notice to be published in some newspaper published in the city or county in which the suit is pending - if there be a daily paper, then in such paper for ten days consecutiv y; or if there be no daily paper, then a weekly paper three times successively - in either case the last publication to be at least three days before the summons is returnable. Proof of such publication shall be made as provided by law for like notices in civil cases. (R. S. 1929, §5943.)

*Sec.* 6055. *Proceedings on return of process.*

Upon the return of such process duly served, or proof of such publication made, the petition shall be heard summarily before said court or a judge thereof, who may, at such hearing, or at any time thereafter, for cause shown, dissolve, modify or continue the injunction: *Provided, however,* that before the defendant shall be permitted to make any such motion, or to be heard on any motion it shall first have answered the petition. If, on the return day of the summons, the defendant shall enter its appearance to the action, and apply for further time in which to answer, the court or judge may extend the time for answering to not exceeding three days from said return day. If the defendant fails to answer on the teturn day, or within the time granted it as above, or fails to appear, the court or judge shall, on motion of the plaintiff, proceed to hear, determine and adjudge the cause, as herein provided, and thereafter proceed in such cause as herein provided. The pleadings and proceedings, in so far as not otherwise regulated by this chapter, shall be as in other civil causes. All pleadings shall be filed within the time herein provided, or as designated by the court or judge, and without regard to terms of the court as to the time of filing the same; nor shall the adjournment of the court for a term work a postponement of pro-

ceedings hereunder to the next term, but the same may be had in vacation as well as term time, and any orders made in vacation or by the judge shall be entered up as of a special term. (R. S. 1929, §5944.)

*Sec. 6056. Hearing by the court.*

The court or judge, on the return day of the summons, shall set the case for hearing on some day not exceeding five days from the return day. All pleadings shall be made up and filed at or before said day for hearing, and the judge or court shall, without the intervention of a jury, and without unnecessary delay, proceed to hear and determine said cause; or on motion of the plaintiff, but in no other case, the judge or court may, on the return day, refer the hearing of the case to a referee, with power to hear the testimony and report his conclusions on the same to the court or judge. If the case is referred, the referee shall forthwith proceed to hear the same, and shall file his report within ten days after the conclusion of the testimony. Any referee failing to at once proceed with the hearing, or to file his report within the time aforesaid, may be removed by the court or judge, in which case he shall not receive any pay or allowance whatever for his services; and the court or judge may thereupon hear the case or appoint a new referee. The fees of the referee shall be taxed and paid as costs in the case. The referee may be allowed for his services not exceeding one dollar and fifty cents for each hour actually spent by him in hearing the testimony in the case, and for taking down the testimony and writing out the same in his report, not exceeding fifteen cents per each hundred words in his report, no pay or allowances whatever being made for exhibits or their contents, or for figures or numerals; and in addition to the above, he may be allowed a fee of not exceeding one hundred dollars for his services in making his report; besides these, no other fees or allowances shall be taxed in favor of the

referee or anyone employed by him, and he shall pay his own clerk or reporter, if he employ one. Exceptions to the report of the referee may be filed by either party. If no exceptions are filed within three days after the report is presented to the court or judge, it shall be confirmed, and judgment entered thereon. In a hearing before the court or judge, or referee, certified copies of the statement made by the company proceeded against, or of reports of examinations of the company made by the superintendent, or persons appointed by him, shall be received, if offered by the superintendent, as *prima facie* evidence of the facts therein contained pertaining to the condition and affairs of the defendant. If the finding be for the defendant, it shall be lawful for the superintendent to appeal the case. If the finding be for the plaintiff, the court shall enjoin the company, either temporarily or perpetually, from the further prosecution of its business, or the court shall render judgment dissolving the company, or the court may render both such decree and judgment. Such decree or judgment shall, for all purposes of an appeal, be considered a final judgment, and the defendant may appeal from the same as in other civil cases: *Provided,* the appeal be prayed for and perfected within five days after such judgment, and that the bond shall be for such an amount as the court may fix; *and provided,* that no appeal nor *supersedeas* bond shall operate as a dissolution of an injunction or judgment, if one has been issued. (R. S. 1929, §5945. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6057. *Insurance superintendent to take charge - when.*

If the superintendent of the insurance department shall apply, either at the time of or after the filing of the petition referred to in section 6052, R. S. of Mo. 1939, the court may, if the court deem it necessary, authorize him to temporarily take charge of the property of the defend-

ant and to receive its premiums and other income until a final decree is rendered. (R. S. 1929, §5946. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6058. *Title of assets to vest in superintendent.*

Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets. (R. S. 1929, §5947.)

*Sec.* 6059. *Disposition of assets.*

If the court directs the superintendent of the insurance department to liquidate, settle or wind up the affairs of such company, said superintendent shall take immediate possession of the assets, books and papers of such company, and unless disposition of the assets of said company is made by a reinsurance agreement as may be provided by law, he shall sell and dispose of the real estate and other property of such company, subject to the approval of the court, and may execute in his own name, as superintendent of the insurance department, all necessary and proper conveyances of the same; he may also, in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state, or of the United States, relating to such company, its assets, liabilities and business. (R. S. 1929, §5948. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6060. *Allowance of demands—commissioners appointed.*

The court or judge in or before whom the case is pending, upon the application of said superintendent, shall limit and may extend the time for the presentation

of claims against such company, and notice thereof shall be given in such manner as said court or judge shall direct; and any creditor neglecting to present his claim within the time so limited shall be debarred of all right to share in the assets of such company. Said court shall appoint one or not more than three disinterested persons as commissioners to receive and decide upon the claims presented against such company, who shall give notice of the times and places of their meeting for that purpose, in such manner as said court shall prescribe, and within one month after the expiration of the time so limited, shall file with the clerk of said court a list of the claims presented to them, specifying those allowed, the amount allowed and those disallowed (R. S. 1929, §5949.)

*Sec.* 6061. *Duties and powers of superintendent.*

If the court directs or orders the superintendent of the insurance department to rehabilitate an insurance company, upon the rendition of such an order, the title and right to possession of its books, papers, records, property and assets, of whatsoever kind or nature, shall immediately vest in and pass to the superintendent of the insurance department, and said superintendent shall forthwith proceed to conduct the business of such insurance company and take all proper steps to remove the causes and conditions which have made such proceedings necessary, subject, however, to the orders of the court. Said superintendent may, subject to the approval and direction of the court, sell and dispose of any of the property of such company, may borrow money on the security of such property, may execute in his own name as superintendent of the insurance department all necessary and proper instruments and conveyances, and may also in his own name as such superintendent, maintain and defend all actions in the courts of this or any other state or states of the United States relating to such company, its assets, business and liabilities. If at any time, in the opinion

of the superintendent of the insurance department, a further continuance of the order of rehabilitation would be futile, he may apply to the court for an order to liquidate, settle or wind up the affairs of such company, or if at any time during the continuance of such order of rehabilitation the cause for any such order or like order has actually been removed, the superintendent of the insurance department or any interested person, upon due notice to such superintendent, may apply for an order terminating the proceedings and permitting such insurance company to resume title and possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court shall determine that the purpose or purposes of the proceedings have been fully accomplished. (R. S. 1929, §5950. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6062. *Distribution of assets.*

Unless reinsurance of a dissolved company is effected and its assets conveyed to the reinsuring company as provided by law, and unless such dissolved company is being rehabilitated under other sections of this article, the superintendent of the insurance department, under the direction of said court, shall apply the sums realized from the assets of such dissolved company, first, to payment of all the expenses of closing the business and disposing of the assets of such company; second, to the payment of all lawful taxes and debts due the state and the United States and the counties and municipalities of this state; third, to the payment of the death losses and matured policy claims; fourth, to the payment of the debts and claims allowed against such company, and the unearned premiums and the surrender value of its policies, in proportion to their respective amounts; and lastly, any sums remaining in the hands of said superintendent, after the payments have been made in full as herein provided, shall be disposed of in such manner as said court shall order and direct: *Provided, however,* that if the company is a life insur-

ance company, and has deposits for policyholders, or for the security of registered policies or annuity bonds, such deposits shall be disposed of as in this chapter is specially provided in respect to the same. And said court may make all orders and decrees necessary and proper in reference to the title, possession, disposition and distribution of all assets, and the allowance and satisfaction of claims against said company, and in any other matter relating to its affairs and business. In case of a conflict of interests on any matter, or concerning the enforcement or settlement of any conflicting claims between two or more dissolved insurance companies, the settlement and winding up of whose affairs shall be under the charge of the superintendent, it shall be the duty of said superintendent, and the right of any person interested in any of the said companies, to report the fact of conflict and the question or questions involved to the court in which any of the causes is pending, and such court shall thereupon have power to appoint a trustee, to have charge and control of the interests of any of said companies as regards the settlement or enforcement of its claims in respect to the matter in controversy, or to make such other orders providing for the settlement, adjustment or enforcement of the rights of said company in said matter as to the court shall seem best adapted to the protection of the rights of all; and *provided further,* that nothing in this section shall be construed to authorize a distribution of the assets of a company already dissolved, so that creditors whose right to a ratable distribution of the assets of said company which has been fixed and determined by such dissolution shall be deprived of such right. (R. S. 1929, §5951. Reenacted, Laws 1933, Ex. Sess., p. 65; Amended, Laws 1939, p. 457.)

*Sec.* 6063. *Superintendent to take charge of assets.*

Whenever, by this chapter, or by any other law of this state, the superintendent of the insurance department is authorized or required to take possession of the

assets of any insurance company, any person or company who shall neglect or refuse to deliver to said superintendent, on his order or demand, any books, papers, evidences of title or debt, or any property belonging to any such company in its, his or their possession, or under his, its or their control, shall be punished by a fine of not more than ten thousand dollars, or if an individual, by imprisonment in the county jail for not exceeding two years, or in the penitentiary for not exceeding three years, or by both said fine and imprisonment. (R. S. 1929, §5952.)

*Sec.* 6064. *Reinsurance of dissolved companies.*

Whenever any decree enjoining a company perpetually from further prosecution of its business or judgment of dissolution is rendered or granted under the provisions of this article, the superintendent of the insurance department may make or cause to be made, a report verified by affidavit, showing the actual condition of such company. Whenever such report shall show facts warranting, in the opinion of the superintendent of the insurance department, the reinsurance of the risks of such company, then, subject to the approval and direction of the court said superintendent shall proceed to reinsure such risks on the best terms obtainable for all persons interested. (R. S. 1929, §5953. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6065. *Payment of expenses of proceedings.*

In proceedings to enjoin, rehabilitate, dissolve, wind up or otherwise settle the affairs, and dispose of the assets of insurance companies, the superintendent of the insurance department shall receive no fees nor compensation for any services personally performed by him. He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to

the amount of compensation to be paid them, and the expenses of such employment together with all necessary expenses in the settlement of the business of the company, or the collection, disposition or distribution of its assets shall be taxed as costs, and paid by the Superintendent out of the assets of such company; or, in case it is reinsured, by the reinsuring company, or if the company proceeded against has no assets, then as by law in such cases provided, to the persons doing the work and rendering the service. The superintendent shall keep a full account of all receipts and disbursements, and make report of the same to the court having jurisdiction thereof at least once in twelve months, and oftener if required by the court and shall be responsible on his official bond for all assets coming into his possession. The court may, in its discretion, require of the superintendent a bond in addition to his official bond. (R. S. 1929, §5954. Reenacted, Laws 1933-34, Ex. Sess., p. 65.)

*Sec.* 6066. *Receivers' reports.*

In all cases where, under the provisions of the laws of this state, insurance companies have been heretofore or shall hereafter be dissolved and placed in the hands or charge of a receiver or receivers, or persons other than the superintendent, by decree of court or operation of this law, it shall be the duty of such receiver or receivers or persons to make full and complete itemized reports, under oath, to the superintendent of the insurance department of all receipts and disbursements, and of the condition and affairs of the company or companies under their charge; such reports shall be made once in every three months; the first report made under this law shall be brought down to the first day of October, 1879, and shall embrace an itemized statement of all receipts and disbursements, and of all property and assets then on hand, and account for all on hand from the date of the appointment of such receiver until the date of such report; it shall be filed with the said superintendent on or

before the fifteenth day of October, 1879; in case any receiver or receivers or persons shall fail to make such report within the time aforesaid, or to make any regular report as above required, the court, on motion of the superintendent, shall compel the same to be done. (R. S. 1929, §5955.)

*Sec. 6067. Superintendent to have access to books, etc.*

The superintendent may, at any time, have access to the books and papers of any receiver or other trustees, heretofore or hereafter appointed, for the purpose of examining his accounts, and may at any time be heard in person or by counsel on any matter affecting the administration of the affairs of such receiver or trustees. (R. S. 1929, §5956.)

*Sec. 6068. Removal of receivers.*

If any receiver or trustee heretofore appointed, and now charged with the winding up of the affairs of any insurance company, dies, resigns or is removed, the court shall thereupon turn the administration of its affairs over to and vest the title to all its property undisposed of in the superintendent of the insurance department, as by this chapter is provided in case of the dissolution of an insurance company; and thereupon said company's affairs and assets shall be disposed of in the same manner as in this chapter provided. In the settlement of the affairs of insurance companies already dissolved and in the hands of the courts by its receivers the court shall, as far as possible, conform to and be governed by the provisions of this law. (R. S. 1929, §5957.)

*Sec. 6069. Final settlement of receivers.*

It shall be the duty of every receiver heretofore appointed and now in charge of the affairs of any insolvent company, and of the superintendent of the insurance department, when charged with the winding up of the affairs of any such company, to make, at least twice a year,

to the court in which the cause is pending, and oftener, if the court shall so order, a full report, under oath, of the condition and affairs of such company; and if it shall appear to the court from such report that, after reserving an amount sufficient to pay the probable expense of winding up said company, there shall remain in the hands of such receiver or superintendent enough cash to pay at least ten per cent of the allowed claims, the court may order the same to be distributed according to the rights of the claimants. The superintendent and every such receiver shall make final distribution of the assets and final settlement of the affairs of each insolvent company, now or hereafter in his charge, and settlement of his accounts within the shortest time practicable, in no case to exceed three years from the date at which said company has been or shall be dissolved: *Provided,* that the court may, for good cause, extend the time for such final settlement, not more than two years. For the purpose of making final settlement the superintendent or receiver shall, at least three months before making the same, convert into money all assets remaining undisposed of, and distribute the same among those entitled thereto, under the order of the court. If, thirty days after such final settlement and distribution, any such receiver shall have in his hands any moneys unpaid or unclaimed, he shall pay the same over to the superintendent of the insurance department, and if such moneys are not paid, or claimed by the parties entitled thereto, within one year thereafter, the same, as well as any such fund so remaining in the hands of the superintendent after like final settlement and distribution by him of the assets of any company in his hands, shall be paid into the state treasury, and held and disposed of as provided by law for escheats. Notice of such final settlement shall be given by publication in some newspaper published in the city or county in which such proceedings are pending, for at least four weeks prior thereto. (R. S. 1929, §5958.)

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# Supreme Court of the United States

OCTOBER TERM, 1942.

**No. 493.**

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

## BRIEF FOR RESPONDENT, CENTRAL SURETY AND INSURANCE CORPORATION, IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner seeks a Writ of Certiorari to review a judgment of the Supreme Court of Missouri which reversed outright a judgment of the Circuit Court of Jackson County, Missouri, at Kansas City.

There has been no official report of the opinions delivered by the Supreme Court of Missouri but they are reported unofficially in 163 S. W. 2d 750 (on the merits) and 163 S. W. 2d 749 (*per curiam* opinion of Supreme Court of Missouri *en banc* denying petitioner's application for leave to file *en banc* a motion to transfer the cause from

Division Number 2 of the Supreme Court of Missouri to that court *en banc*). No opinions were written by Division Number 2 of the Supreme Court of Missouri (the court that decided the case at bar) on either its denial of petitioner's motion for rehearing or its denial of petitioner's motion to transfer to the Supreme Court of Missouri *en banc*, both of which were, under the Missouri practice and procedure, properly filed in said Division Number 2.

The following sections of the brief are in the order indicated in Rule 27 of this Court.

## JURISDICTIONAL STATEMENT.

Rule 7, paragraph 3, of this Court provides that "no motion by respondent to dismiss a petition for certiorari will be received" but that "objections to the jurisdiction of the Court to grant writs of certiorari may be included in the briefs in opposition to petitions therefor." In compliance with that rule we respectfully show the Court that plaintiff's complete failure to comply with the rules of this Court require the denial of the petition for writ of certiorari.

### The Petition for Writ of Certiorari Contains No Jurisdictional Statement As Required by the Rules of This Court.

Rule 38, paragraph 2, of this Court provides that "the petition shall contain * * * a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, paragraph 1)." Rule 12, paragraph 1, of this Court specifically provides that "the provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari (See Rule 38, paragraph 2)."

The petition for writ of certiorari in the case at bar contains no jurisdictional statement whatsoever. Therefore, the provisions of Rule 38, paragraph 2, providing that "a failure to comply with these requirements will be a sufficient reason for denying the petition" is directly applicable and the petition should be denied.

The Bar and the public have long been apprised of the decisions of this Court that failure to comply with its rules is fatal. In addition to the cases cited in Rule 38, paragraph 2, see *Humble Oil & Refining Company* v. *Campbell*, 292 U. S. 648, and *Brown* v. *Krietmeyer*, 275 U. S. 496, where petitions for writs of certiorari were denied for failure to make only a summary and concise statement of the matters involved and the reasons relied upon for issuance of the writ. The cases denying jurisdiction for failure to comply with Rule 12 are so numerous as to require no citation. See also *Davis* v. *Currie*, 266 U. S. 182, and *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U. S. 508, for denials of petitions for writs of certiorari on account of other failures to comply with Rule 38.

Petitioner is not aided by that section of his supporting brief entitled "Jurisdiction" found on page 2 thereof, for two reasons: First, because the supporting brief is not a part of the petition for writ of certiorari, and second, because even if so considered, petitioner's statement in the supporting brief does not comply with the requirements of the rules of this Court.

**Supporting Brief Not a Part of Petition for Writ of Certiorari.**

*General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178, held that:

> "Whether (the questions presented are) included in the petition or separately presented, *the supporting brief is not a part of the petition* * * *" (parentheses and emphasis ours).

The above case passed upon the matter of whether questions not presented in the petition for writ of certiorari were before this Court and held that only those questions specifically set out in the petition were to be so considered. However, the principle that "the supporting brief is not a part of the petition" upon which the decision of that case was based is even more applicable to the case at bar, because both Rule 38 and Rule 12 specifically require the petitioner to make a jurisdictional statement in the petition for writ of certiorari. Failure to do so under the rules and decisions of this Court is a sufficient reason for denying the petition.

**Petitioner's Statement Concerning Jurisdiction Contained in Supporting Brief Does Not Comply with Rules.**

Even if Petitioner's statement entitled "Jurisdiction" be considered a part of the petition, which this respondent denies, there still is a total failure on the part of petitioner to meet the burden of affirmatively showing this Court that it has jurisdiction. There is no question that such is petitioner's burden in the light of *Gorman* v. *Washington University*, No. 711, decided by this Court April 27, 1942, in which it was held that "upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that we have jurisdiction." The record shows that petitioner is thoroughly familiar with that case. In fact, petitioner relied upon that case in attempting to file a motion for transfer in the Supeme Court of Missouri *en banc*, instead of filing it only in Division Number 2 of the Supreme Court of Missouri, the Division in which the case was decided, as has been the settled practice in Missouri since 1896 (see *per curiam* opinion of the Supreme Court of Missouri *en banc*, denying petitioner's application for leave to file *en banc* his motion to transfer, Tr. 1470, and see also foot note contained in said motion, Tr. 1406).

Rule 12, paragraph 1, which is incorporated into Rule 38, by paragraph 2 thereof, explicitly provides regarding the jurisdictional statement in petition for writ of certiorari that:

> "The statement shall show that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction. It shall also include a statement of the grounds upon which it is contended that the questions involved are substantial (*McArthur* v. *United States*, 315 U. S. 717; *Zucht* v. *King*, 260 U. S. 174, 176, 177)."

None of the requirements of this portion of Rule 12 are met by petitioner. Even petitioner's supporting brief does not show the nature of the case; neither is a single case cited to sustain this Court's jurisdiction, nor is there any where stated or suggested a substantial federal question.

Rule 12 also provides:

> "If the (certiorari) is from a state court, the statements shall in addition specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of * * * the record * * * as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court" (Parentheses ours).

Nothing in the petition for writ of certiorari can be construed as a compliance with the above portion of Rule 12. Even if petitioner's supporting brief be considered a part of the petition, which this respondent denies, still there is no compliance. Petitioner admits on page 5 of his petition that the first time he attempted to inject

any question that could be later raised in this Court, was by motion for rehearing in the Supreme Court of Missouri after that court had determined the case and had filed its written opinion found on page 1339 of the transcript (Petitioner does not mention the fact that, under the Missouri practice, this attempt was too late to have those questions considered, or the fact that he does not now attempt to present the questions here that he attempted to raise below but tries to raise an entirely new and different question for the first time in this Court, as will be subsequently shown hereinafter).

The only place where it could be said that petitioner even mentioned the matters required to be stated in the jurisdictional statement is on page 12 of the argument contained in the supporting brief. Even if this portion of the argument could be considered a part of the section of petitioner's briet entitled "Jurisdiction" and, even if thus transposed, that portion of the argument together with said "jurisdiction" section could in like manner be retransposed so as to be considered as a part of the petition, all of which this respondent denies is possible, there still is no compliance with the rules because the cases cited by petitioner are not applicable to the case at bar.

Petitioner on page 12 of his argument in the supporting brief contends that he has a valid excuse for not attempting to raise the matters now complained of prior to the motion for rehearing because:

> "* * * It cannot be said, as it was said in *Herndon* v. *Georgia,* 295 U. S. 441, that respondent* should have anticipated the unconstitutional construction of

*The word "respondent" should undoubtedly be read as "petitioner." The error is probably one of oversight in having this verbatim argument copied from petitioner's suggestions in support of motion to transfer that he filed in the Supreme Court of Missouri (Tr. 1418). In fact, except in important particulars to be hereinafter mentioned, petitioner's entire argument up to the point quoted and a good portion of it thereafter is but a verbatim copy of the suggestions in support of motion to transfer filed in the Supreme Court of Missouri (Compare Tr. 1416 to 1420 with pages 8 to 12 of petitioner's supporting brief).

the statutes. Consequently presentation in detail of the federal questions on motion for rehearing is sufficient presentation in point of time."

Petitioner overlooks completely that it has long been the rule of this Court that if a federal question is not raised in accordance with the state practice, then, absent evasion on the part of the state court, this Court will not exercise jurisdiction to hear the cause.

**The Questions Petitioner Seeks to Raise Here Were Not Properly Raised under Missouri Practice.**

The unquestioned rule of decision of this Court is adequately stated in *Herndon* v. *Georgia,* 295 U. S. 441, 443. It is there stated:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it (Citing many cases) * * *"

Decisions of this Court dealing particularly with the Missouri practice and applying the foregoing rule of decision are numerous. We first call attention to *Layton* v. *Missouri,* 187 U. S. 356, wherein it is stated:

> "After judgment (in Division Number 2 of the Supreme Court of Missouri) was entered affirming the judgment of the trial court, defendant moved that the cause be transferred to the court *en banc,* and the motion was denied.
>
> "By the Constitution of Missouri, the supreme court was divided into two divisions; division Number 1, consisting of four judges, and division Number 2, consisting of three judges, the latter having exclusive cognizance of all criminal causes; and it was provided that cases, in certain circumstances, among others when a Federal question was involved, on the application of the losing party, should be transferred to a full bench for decision. * * *"

In denying jurisdiction, this Court held:

> "* * * It has been repeatedly laid down by the supreme court of Missouri, in disposing of questions of jurisdiction as between itself and intermediate courts of appeal, that 'the appellate jurisdiction of the supreme court contemplates a review only of the matters submitted to and examined and determined by the trial court. Hence it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court.' *Browning* v. *Powers*, 142 Mo. 322, 44 S. W. 224; *Bennett* v. *Missouri P. R. Co.*, 105 Mo. 645, 16 S. W. 947; *Shewalter* v. *Missouri P. R. Co.*, 152 Mo. 551, 54 S. W. 224.
>
> "* * * we cannot interfere with the action of the highest court of a state in adhering to the usual course of its judgments, and we have frequently ruled that this court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the Constitution of the United States had been adjudged, where those courts 'did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice.' *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605, 607.
>
> "This case falls within that rule * * *."

*Hartford Life Insurance Company* v. *Johnson*, 249 U. S. 490, 493, also passing upon the Missouri practice, held:

> "No suggestion is or could be made, that the Missouri state supreme court's holding in this case was framed to evade the consideration of the Federal right now asserted, for it had long been the established law of that state that, under its system of practice, the construction of either the Federal or state Constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate

court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller* v. *Connor*, 250 Mo. 677, 684, 157 S. W. 81. * * *

"On the authorities thus cited we are obliged to conclude that the question * * * was not so presented to or ruled upon by the supreme court of Missouri as to present a Federal question for review by this court."

No attempt is made by petitioner and any attempt would, of necessity, fail, because of the record in the case at bar, to charge that the Supreme Court of Missouri attempted to evade passing upon any federal question. The action of Division Number 2 of the Supreme Court of Missouri in refusing to transfer the case at bar to the Supreme Court of Missouri *en banc* conclusively decided that no federal question was properly before the Supreme Court of Missouri because of petitioner's failure to raise the same in accordance with the established Missouri practice.

On this point *Layton* v. *Missouri*, *supra*, is controlling:

"It thus appears that the supreme court * * * by denying the motion to transfer the cause, was of opinion that the validity of the statute was not so drawn in question for repugnancy to the Constitution of the United States as to require decision as to its validity in that view."

Under the rule of *Gorman* v. *Washington University*, *supra*, likewise passing upon the Missouri practice, it is the petitioner's burden to show affirmatively that this Court has jurisdiction. In this instance petitioner has failed either to assert or in any way imply that the Supreme Court of Missouri attempted to evade the decision of any federal question. On the contrary, the refusal of Division Number 2 of the Supreme Court of Missouri to transfer the case at bar to the Supreme Court of Missouri *en banc* showed that it did not consider that any federal question was before that court because under the Mis-

souri practice such a question must be raised in the trial court in order to be within the appellate purview of the Supreme Court of Missouri.

It is without question that the Supreme Court of Missouri followed the settled Missouri practice in the case at bar.

*Wilson & Company, Inc.*, v. *Hartford Fire Insurance Co.*, 300 Mo. 1, 254 S. W. 266, 285, illustrates the Missouri practice of refusing to transfer to the Supreme Court *en banc* where a federal question was not raised in the trial court and properly preserved for consideration on appeal. In that case the losing party contended, as petitioner now contends in the case at bar, that there was involved a federal question. In refusing to transfer the Supreme Court of Missouri held:

> "A federal question as here urged involves a construction of the Constitution. We have repeatedly held that the construction of either the federal or the state Constitution would not be treated as involved in a case in a jurisdictional sense, unless such question had been raised and ruled upon in the trial court. Not only was this not done, but its first appearance is in the filing of this motion. *Miller* v. *Connor*, 250 Mo. 677, 157 S. W. 81. This cannot be construed as other than an afterthought on the part of the appellant. The cases cited by appellant in support of the motion all show that the federal question there claimed to have been involved was raised specifically in the trial court, and was properly preserved for consideration upon appeal. The Supreme Court of the United States, in passing upon this question, has given affirmative approval to our own rulings in this regard, and has held that no right, privilege, or immunity claimed under the Constitution can be considered as involved in a case, unless it is specifically asserted and preserved for consideration, and that the decision of the court complained of must be against the right asserted to entitle the question to consideration upon appeal, either in the state Supreme Court or in the Supreme Court of the United States. *Say-*

*ward* v. *Denny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941."

*Holstein* v. *Roofing Co.*, 325 Mo. 899, 42 S. W. 2d 573, states the procedural rule of Missouri requiring constitutional questions to be raised at the earliest possible moment. The Supreme Court of Missouri there held that:

> "The rule is uniform that a constitutional question must be raised at the first opportunity and kept alive in the course of orderly procedure. In the nature of things there can be no fixed rule as to when or how or at what stage of the proceedings the question should be raised in each case. But the rule is well established that it is too late to raise a constitutional question in the motion for a new trial."

In this case petitioner was under duty to raise any constitutional question in his exceptions to O'Malley's report. This he failed to do. No federal question of constitutionality of the Missouri Insurance Code was properly raised because there admittedly was no attempt to raise such a question until a petition for rehearing was filed in the Supreme Court of Missouri.

In *Mike Berniger Moving Co.* v. *O'Brien*, 234 S. W. 807, a plaintiff attempted to enjoin the chief of police of St. Louis from enforcing an ordinance which plaintiff alleged was invalid. In holding that no constitutional question was involved, the Supreme Court of Missouri held:

> "If the plaintiff desired to challenge the constitutionality of said ordinance, set out in petition, and offered in evidence, it should have done so in its petition, as this was the earliest opportunity for raising said question. Having tried the case on its merits without presenting or raising any constitutional question, it could not be raised so as to confer jurisdiction of the cause on this court by presenting said question for the first time in the motion for a new trial."

*State ex rel. Tadlock* v. *Mooneyham*, 296 Mo. 421, 247 S. W. 163, involved an action against a County Treasurer

to restrain him from paying a warrant issued by the County Court of Jasper County, Missouri. Judgment was for the plaintiff and defendant appealed. In holding that it had no jurisdiction, the Supreme Court of Missouri held:

> "The petition by which the injunction and the cancellation of the warrant are sought does not mention the Constitution. It only says the county court had no legal authority to make the contract or issue the warrant. The answer alleged that it had. The Constitution is not mentioned in the answer.
>
> "In order that a constitutional question may be raised, so as to give this court jurisdiction, it must be presented to the trial court at the earliest possible moment and kept alive throughout the case. * * * There is nothing to show that the trial court passed upon or considered a constitutional question. It should have been raised in the pleadings, because every fact affecting the case is set forth in the pleadings, and if these facts show that any section of the Constitution was involved in determining the issues presented, such section of the Constitution should have been cited."

Petitioner in the trial court originally filed sixteen separate exceptions to O'Malley's Final Report and Accounting (Tr. 59-67). Not one of these exceptions even remotedly hypothesized petitioner's present theory, nor was any reference made to any provision of either the State or Federal Constitutions. Fourteen new exceptions were made by petitioner to O'Malley's Supplemental Report and Accounting (Tr. 90-97). These exceptions likewise preserved petitioner's silence regarding any constitutional question. Thereafter and subsequent to the time that all the evidence in the case had been heard, petitioner stipulated as to what exceptions he would rely upon. By this stipulation (Tr. 99) petitioner expressly limited his exceptions to seven specific items and in none was there any injection of any constitutional question. In the trial court petitioner filed a thirty-eight page printed brief together with a fifteen page reply brief, neither of which

contained a single word concerning petitioner's present theories nor the slightest reference to any constitutional question.

Petitioner in the trial court—indeed, in the Supreme Court of Missouri—not only did not question the constitutionality or validity of the statute herein involved (The Insurance Code) but expressly relied upon it as the basis for the judgment which he obtained in the trial court. Throughout the litigation, until the Supreme Court of Missouri decided against him, he undertook to use the statute (and an unreasonable construction of it) as a weapon for imposing upon the Superintendent and his Surety an unconscionable judgment.

As a matter of fact, the proceeding from the beginning was guided and governed by this very statute—the Insurance Code. The original proceeding is still pending in the Circuit Court of Jackson County, Missouri. The petitioner herein is now the Superintendent, acting in the proceeding under the various statutes which he now assails. If he is paying, or hereafter expects to pay any expense of the administration in the proceeding, he must pay that out of the identical fund from which the expense in question was paid. There is no other fund out of which such expense can be paid. Reference will hereafter be made to this fact.

We respectfully submit that the petition should be denied because:

(1) It fails to comply with the rules of this Court in the respects hereinbefore noted.

(2) It fails to state any facts upon which the jurisdiction of this Court might or could be based.

(3) It fails to indicate that any Federal or Constitutional question is involved.

(4) It fails to indicate any reason why this Court should exercise its discretionary power in granting the

writ, even if facts were stated upon which such discretion might be predicated.

(5) It shows that petitioner not only failed to raise any Federal or Constitutional question in the trial court or before the Supreme Court of Missouri, but further shows no such question was actually involved so that it could have been raised.

(6) It demonstrates that petitioner now undertakes to assail the statute in question upon allegedly constitutional grounds after long reliance and action upon its validity, and after urging a construction of it, which the Supreme Court of Missouri has completely repudiated—a construction, which was wholly unreasonable and the repudiation of which within all reason should have been anticipated at the outset.

## STATEMENT OF CASE.

Rule 27, paragraph 4, provides that respondent need not make any statement of the case beyond what may be necessary to correct any inaccuracies or omissions in the statement made by petitioner. Petitioner's statement is so incomplete and inaccurate that this respondent believes the Court would be aided by a concise statement of the case. Thereafter, the inaccuracies in petitioner's statement will be noted.

Under the Missouri practice, the case at bar was considered *de novo* by the Supreme Court of Missouri (See *Robertson, Superintendent of Insurance,* v. *Manufacturing Lumbermen's Underwriters et al.*, 346 Mo. 1103, 145 S. W. 2d 134, involving another appeal arising out of the same litigation as the appeals in this case and in which the trial court was also reversed). This rule of practice requires the Supreme Court of Missouri to make its own findings of fact independent of any findings of the trial court. It, of course, did so. Because the rule of this Court is that "the decision of the state court upon a question of fact cannot be made the subject of inquiry here" (*Grayson* v. *Harris*, 267 U. S. 352, 358), we shall make the statement by using direct quotations from the opinion of the Supreme Court of Missouri (Tr. 1339-1358), including matters pertinent to an understanding of the facts.

### Facts.

"On November 12, 1936, appellant, O'Malley, as Superintendent of Insurance, took charge of the affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange. This concern will be referred to as M. L. U. On October 20, 1937, O'Malley was succeeded in office by George A. S. Robertson. Robertson filed ex-

ceptions to the report of O'Malley with reference to the expenses incurred in handling the affairs of M. L. U. The trial court surcharged O'Malley with $85,264.44 and entered a judgment against O'Malley and his surety, the Central Surety and Insurance Corporation. From that judgment two separate appeals were taken (Tr. 1339-1340).

* * * * * * * *

"* * * When O'Malley took charge of M. L. U. an examination of its affairs was being made by the Superintendents of Insurance of Missouri, Iowa, Illinois and Oklahoma. O'Malley's petition was assigned to Judge Daniel E. Bird. The court made an order, as contemplated by section 6057, authorizing O'Malley to take temporary charge of the property of M. L. U. and to receive its premiums and income. M. L. U. and its attorney in fact were restrained from further transaction of business. Harold C. Fielder was appointed by the superintendent as agent to take charge of the affairs of the company and placed under a $50,000 bond. On November 16, the attorney in fact filed an application for a change of venue, or rather an application to disqualify the trial judge. The court never ruled on this application. November 18, by agreement of the parties, the case was continued for a final hearing until a report could be had of the examination by the departments of insurance of the four states above mentioned. That examination was completed December 21, 1936. However, prior thereto, on December 1, 1936, the attorney in fact filed a petition placing M. L. U. in voluntary bankruptcy, which petition was dismissed by Judge Otis on December 30, 1936. See *In re Manufacturing Lumbermen's Underwriters* (18 F. Supp. 114). On January 16, 1937, the attorney in fact filed a mandamus proceeding in the Supreme Court to compel Judge Bird to act upon the application to disqualify himself. This court issued a stop order, which continued in force until February 19, 1937, preventing Judge Bird from mak-

ing any further orders. On February 27, 1937, and while the application to disqualify Judge Bird was still pending, an involuntary petition in bankruptcy was filed by a number of creditors of the Exchange. This proceeding was dismissed by Judge Reeves on July 7, 1937, and shortly thereafter an appeal was taken to the United States Circuit Court of Appeals. On March 2, O'Malley filed an amended petition setting forth the facts as disclosed by the examination of the insurance departments of the four states above mentioned. In order to eliminate the question of the qualification of Judge Bird, O'Malley, on March 3, filed an application for a change of venue, which Judge Bird granted, and the case was transferred to Judge Allen C. Southern. Thereafter, on April 1, 1937, the court entered a decree, as provided for in sections 6056 and 6058, permanently enjoining the defendants, dissolving the Exchange and vesting title to the property in the Superintendent of Insurance. On August 14, 1937, after the second bankruptcy petition was dismissed, O'Malley filed a petition in the court that he be directed to liquidate the Exchange. The court so decreed (Tr. 1343-1344). * * *

"* * * On December 12, 1936, under the foregoing circumstances and while the dispute was being litigated as to whether the federal court or the State Superintendent of Insurance should have charge of the property, both federal and state courts approved a stipulation entered into by the parties in litigation which had the effect of a court order and which read as follows: ' "Pursuant to stipulation of this date, and without prejudice as recited in said stipulation, R. E. O'Malley, Superintendent of Insurance of the State of Missouri, and Commerce Trust Company, Trustee, are authorized to pay to such clerical and actuarial employees and assistants and examiners as shall be designated by said R. E. O'Malley, Superintendent, such portions of compensation as said R. E. O'Malley or his duly authorized deputies or agents shall direct for such period up to, but not beyond, December 12, 1936, as

he or his said agent or deputy shall direct, it being understood that said R. E. O'Malley, Superintendent, may, at his own discretion, determine the employees and assistants to be paid and the amounts to be paid to them, and may discharge such of them as he deems unnecessary to employ. Provided, however, in no event shall said R. E. O'Malley, Superintendent, pay to any such employee or assistant or examiner compensation at a higher rate than such employee or assistant had been receiving up to the time said R. E. O'Malley, Superintendent, took charge, or as to examiners, higher than customary. Provided, further, that no compensation shall be paid to any director of Rankin-Benedict Underwriting Company.'"

"On December 23, 1936, the following order was made: '"Pursuant to a stipulation dated December 12, 1936, and a supplemental agreement and without prejudice as recited in said stipulation, R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, and Commerce Trust Company, Trustee, are authorized to pay such ordinary expenses, including traveling expenses, postage, telegraph, telephone and usual operating expenses as shall be designated and determined by said R. E. O'Malley, Superintendent; and it is further ordered that the order of this Court of December 12, 1936, be modified so as to authorize payment of compensation to H. L. Fulton and Charles H. Isbell, even though they are directors of Rankin-Benedict Underwriting Company.'"

"On January 8, 1937, the following order was entered: '"It is Ordered that R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, in charge of the affairs of defendant exchange, be and he is hereby authorized to pay such ordinary expenses, including traveling expenses, postage, telegraph, telephone, investigation, examination and usual operating expenses, as shall be designated and determined by said R. E. O'Malley, Superintendent"' (Tr. 1344-1345).

* * * * * * * *

"It will be noted from the foregoing that from November 16, 1936, until July, 1937, some action was pending, either in the federal court or in the state court, which prevented O'Malley from obtaining any definite order in the state court (Tr. 1345). * * * The courts, both federal and state, pursuant to stipulation, entered orders authorizing the superintendent to maintain the business of M. L. U. *in status quo* until the disputed questions as to jurisdiction could be settled. At least the orders may be so interpreted because they authorized O'Malley to pay the clerical force necessary to maintain the *status quo* (Tr. 1346).

* * * * * * * *

"* * * O'Malley, on December 12, was authorized to pay the employees engaged in taking care of the affairs of M. L. U. Had it not been for the application to disqualify the trial judge and for the bankruptcy proceeding O'Malley would have been in a position, on December 21, to have asked the court for a final decree, and also would have been free to have asked for rehabilitation and reinsurance orders. In the circumstances no definite order could be obtained. The superintendent therefore attempted to maintain the *status quo* while awaiting the determination of the questions of jurisdiction pending in the courts (Tr. 1348). * * *

* * * * * * * *

"The evidence disclosed that the superintendent did, through the employees under his charge, have examinations and reports made showing the exact status of the general business of M. L. U. for the purpose of reinsuring that phase of the business. He negotiated with the Pearl Insurance Company for that purpose and later with the Atlas Insurance Company. Evidence also disclosed that the employees compiled the necessary information and in a general way prepared to rehabilitate M. L. U. by ridding it of its termite condition, which was the general business, leaving to M. L. U. the reciprocal business. The

plan of reinsurance in the Pearl Insurance Company of the general business in all probability would have been consummated had it not been for the application to disqualify the trial court and for the bankruptcy proceedings which caused the cancellation of thousands of policies. Another unforeseen event which threw consternation into the plan was an unusual flood in the Ohio valley which resulted in losses in excess of $200,000, covered by policies of M. L. U. The Pearl Insurance Company then withdrew from further considering taking over the general business. Thereafter the second bankruptcy proceeding further aggravated the situation and by the time that question was settled M. L. U. was ready for liquidation (Tr. 1349).

* * * * * * * *

"Respondent's position is, that the superintendent cannot employ any help for such purpose without the approval of court and that the court must in the first instance fix the compensation of such employees. Section 6065 governs this question. Note its reading: 'He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, * * *.'

"By an order the trial court in this case placed a limitation on the amount to be paid the employees in that they were not to be paid more than they had been paid by the attorney in fact for M. L. U. The pay roll was expressly approved and ordered paid by the court up to December 12, and note that O'Malley did not pay any help until ordered to do so by the court. The statute authorized the superintendent to employ the necessary help, and as to their compensation he must and in this case did have the court's approval (Tr. 1352). * * *

"Respondent argues that the superintendent had no power or authority to conduct the business of M. L. U. until after the court had directed rehabilitation, citing

section 6061. This case never reached that stage. O'Malley did not conduct the business of M. L. U. except in a very limited degree. No new business was taken on. All unwritten policies in the hands of the agents were ordered returned to the office. O'Malley did attempt to preserve the *status quo* of M. L. U. and have its affairs in such a condition that he could ask the court for an order to rehabilitate and reinsure as soon as a court vested with jurisdiction could make the necessary orders. That such a day was long delayed was no fault of the superintendent. When that day did arrive it was too late to do anything but ask for an order liquidating the concern. In the circumstances we are of the opinion that the superintendent did nothing more than the Insurance Code and the orders of the court authorized him to do. The holding and conclusions of the trial court that O'Malley expended money to conduct the business of M. L. U., to rehabilitate and reinsure without authority, is therefore erroneous (Tr. 1352-1353). * * * We rule therefore that the surcharge against O'Malley cannot be sustained on the theory that he acted without authority of law (Tr. 1354).

* * * * * * * *

"The entire surcharge in this case can have no basis except upon the theory that the Superintendent of Insurance had no authority under the law to rehabilitate M. L. U., maintain its *status quo* or reinsure the so-called general business without first going to the trial court and obtaining specific authority so to do. It is respondent's theory that no matter how honestly O'Malley may have acted in dealing with the affairs of M. L. U., he had no legal authority to act as he did and therefore he must be surcharged with the expenses thus incurred. This, as we see it, is an erroneous theory. As we pointed out the Superintendent of Insurance has certain powers and duties under the Insurance Code as a state officer and is not merely a receiver appointed by the circuit court. We say without hesitation that had it not been for the un-

wise attempt of certain parties to place M. L. U. in bankruptcy and otherwise hinder the actions of O'Malley by applying for a change of venue, rehabilitation of M. L. U. would have been an accomplished fact within a very short time after the superintendent took charge. That this was not accomplished was not O'Malley's fault and he and his surety should not be made the victim.

"The judgment is reversed (Tr. 1357-1358)."

It should also be stated that there never was any question of fraud or dishonesty on the part of the Superintendent of Insurance raised or even intimated in the case at bar. In fact, both counsel for petitioner and the trial judge commended the course of procedure that the Superintendent pursued and expressly stated that there was no question in the case about the expenditures that were made, except that the statute did not confer authority upon him to do so. At the hearing counsel for petitioner stated:

> "* * * I want to say this, that Mr. O'Malley's bank account checks perfectly with the disbursements that he reported; that the drafts which were listed in the settlement are perfectly in accord and reconcile with the bank balance and there is absolutely nothing wrong of that sort, and I don't want it understood that we are charging anything of that sort" (Tr. 171).

A representative of Superintendent O'Malley's successor stated:

> "There is no difference * * * on the question of money expended or properties of the company received and turned over and there will be no question made about expenditures except for the authority for them" (Tr. 866).

Counsel for petitioner further stated:

> "If they had succeeded in keeping it together, it would have been fine. I might say that the motive was wonderful, but I am afraid the judgment

was poor, because the statute, which is the guide under which the companies operate in these proceedings, in my opinion does not permit such conduct, although for the most praiseworthy motive, and I say nothing to impute anything to Mr. O'Malley or his staff in his attempt to save this company, except I don't believe that he had legal authority to do it" (Tr. 170).

The trial judge stated:

"I take it that * * * what Mr. O'Malley was trying to do * * * was * * * to get it into good hands and keep the business going. * * * That is what any body would do if they could" (Tr. 591).

**Correction of Inaccuracies in Petitioner's Statement.**

Some of the inaccuracies to be pointed out involve statements of law as well as of fact and therefore it becomes necessary to discuss some legal questions in connection with the questions of fact.

On page 2 of the petition there appears the statement that Manufacturing Lumbermen's Underwriters "was not a corporation or a mutual company but *simply* an association of individual subscribers to exchange indemnity on a reciprocal plan" (Emphasis ours). The word "simply" is a prediction of petitioner's basic theory and is used in an attempt to attach some significance to the fact that an insurance concern that is operated on a reciprocal plan is operated on a different plan than one operated as a stock corporation or a mutual company.

One of the principal assumptions on which petitioner predicates his entire argument concerning the due process and contract clauses of the Federal Constitution is contained in this statement on page 3 of his petition: "The rights of the subscribers in the reciprocal insurance association were governed by the written power of attorney executed by each reciprocal subscriber."

This assumption is entirely erroneous. It ignores the fact that the organization is operated and exists by virtue of a license issued by the State of Missouri. The rights

of subscribers to set up and operate such an organization is predicated upon obtaining that license which is granted in the exercise of the state's police power. All pertinent statutes of the state, therefore, become a part of every contract which the subscribers make, whether among themselves or between the entity which they set up and the subscribers individually, or otherwise. Therefore, the rights of the subscribers insofar as the state is concerned and the state's relation to this entity in handling its assets when they come under the control of the state agency—the Superintendent of Insurance—are governed by the applicable state statutes. The state's rights with respect thereto and particularly with respect to paying the expenses of the administration of the fund under the control of the state agency are not circumscribed by the contract between the subscriber and his attorney-in-fact. The state is not a party to that agreement and is not bound by such limitations, if any, as the subscribers may undertake to impose on their attorney-in-fact.

Moreover, petitioner gets no aid from that power of attorney because it contains no provision nor intimation that the expense of administering the fund by the Superintendent of Insurance may not be paid out of the fund itself.

In addition to the foregoing, the exceptions to the O'Malley report filed by petitioner's predecessor in office (not O'Malley) did not set up as a defense to the O'Malley account any provision of the power of attorney executed by the subscribers, nor did it intimate that payment of such expenses was in any way affected by that agreement. The issues in the case were made by O'Malley's report in detail of every item of receipts and disbursements during his entire administration and the exceptions thereto by his successor. Failing to assert in the exceptions that the expenses could not be paid out of the so-called 80%, much emphasized in petitioner's statement and brief, that matter was not in issue in the trial court and therefore was not in issue in the Supreme Court.

Even if the question had been appropriately raised by an exception to the report, then the question posed would have been one of construction of the written agreement between the subscribers and their attorney-in-fact. A misconstruction of that agreement by the supreme court of Missouri, if there had been such, which we deny, certainly would not have injected into the case any question of violation of either the due process or contract clauses of the Federal Constitution.

The second fundamental and erroneous assumption upon which petitioner's case here is bottomed is summarized in this statement on page 3 of his petition: "No application to the court was made for authority to expend the individual trust funds of the subscribers." From this premise, petitioner argues that moneys belonging to the subscribers were taken from them without due process and in violation of their contract rights.

The quoted statement is without support in the record insofar as it undertakes to predicate a fact and completely erroneous as to the legal conclusions which petitioner would draw therefrom.

There were no individual trust funds of the subscribers in the sense that any particular sum or item was segregated and belonged to the individual subscriber. The agreement between the subscriber and the attorney-in-fact required the keeping of records as to individual accounts for two reasons: First, if at the end of the year there was any saving in the premium which the subscriber had paid, that would be refunded to him; second, the subscriber's agreement with the attorney-in-fact provided that the subscriber might be assessed an additional sum equal to the amount which he had already paid as premium if that were necessary to meet the obligations of the exchange. The record, of course, was necessary for the purpose of determining the status of the account of the individual, either for the payment back to him of his part of the surplus or the making of an assessment if one were required. So far as the funds themselves

were concerned, they were never segregated or kept in individual accounts but, on the contrary, the subscribers' agreement provides they should be deposited in a trust company in the name of the attorney-in-fact, not in the name of the subscriber; so that the record concerning them was merely a bookkeeping entry made for the purposes above stated and not for the purpose of segregation and not for the purpose of creating them as individual trusts.

In addition to the fact that there were no individual trust funds of the subscribers, the last quoted statement is erroneous in asserting that no application to the court was made for authority to expend these funds. The opinion of the Supreme Court of Missouri hereinbefore quoted from contains this statement: "The courts, both federal and state, pursuant to stipulation, entered orders authorizing the Superintendent to maintain the business of M. L. U. *in status quo* until the disputed questions as to jurisdiction could be settled. At least, the orders may be so interpreted because they authorized O'Malley to pay the clerical force necessary to maintain the *status quo*" (Tr. 1463).

The court was referring to the orders of December 12 and December 23, 1936, and January 8, 1937, the first two of which authorized the payment of items within specified dates and the latter authorized payment of such items generally without limitation as to date. All of them were the very items and the type of items involved in this proceeding.

Petitioner also overlooks the fact that the very purpose of this entire proceeding and its only purpose was that the court pass upon the expenditure of the items in question. The previous orders generally authorized him to incur expenditures for maintaining the business in *status quo*, as the Supreme Court of Missouri construed them and stated in its opinion. His final report detailed the items dollar for dollar covering his entire administration, and asked the court to approve those expenditures. Peti-

tioner, representing all of the subscribers (which he admits in the first statement of his petition herein) was from the beginning a party to the proceeding as to the allowance of these items and objected to them and through him the subscribers made their objection and participated in the hearing. The petitioner himself, in a brief filed in the trial court, characterized this proceeding in this way: "Therefore, in examining this report for approval, the court must view the expenditures set out therein in exactly the same light as if the receiver was making application to incur these expenditures. Any expenditures found therein which appear to be unnecessary and which the evidence before the court discloses would not warrant court authorization if the expenditure had not already been made must now be disallowed by the court and the amount surcharged against the receiver, O'Malley."

It was a hearing in which petitioner's predecessor represented the subscribers and the purpose of it was to determine whether the expenditures made by O'Malley were proper. Therefore, when petitioner states, as he did in the above quotation, that no application to the court was made for authority to expend these funds, he forgets the three orders made by the court above mentioned and forgets that the whole purpose of this proceeding is to determine the propriety of those expenditures.

To assert that application must have been made before the expenditures were incurred would present a wholly impossible situation and one not contemplated by the statute and one which the Supreme Court of Missouri held not to be within the purport of the statute. There were many thousands of items involving expenditures of all types and there is no possible way that the number or amounts of those items could have been anticipated but the orders which the court made were broad enough to cover the expenditures by classes and types.

The Supreme Court of Missouri has held that the method pursued here was proper and the expenditures

were authorized. Section 6065, Revised Statutes of Missouri, 1939, being part of the Insurance Code, expressly provides that all necessary expenses in a proceeding of this sort "shall be taxed as costs and paid by the Superintendent out of the assets of such company." The funds which came into the custody and control of the Superintendent made up those assets. They included what petitioner in the above quotation has referred to incorrectly as individual trust funds of the subscribers. Except for the premiums paid by the subscribers, the exchange had no funds. Those premiums constituted its working capital and assets of whatever type. They were the assets out of which expenses of administering those assets necessarily and in accordance with the provision of the statute above quoted had to come. This proceeding was for the purpose of protecting the subscribers in their policies and to protect their creditors. There can be no sound reason why the assets being protected should not bear the expense of that protection.

The case of *Commonwealth* v. *Keystone Indemnity Co.*, 339 Pa. 405, 1 Atl. 2d 887, involved liquidation of a reciprocal insurance company in which the specific question was asked, "Does the subscriber's liability include * * * administration expenses, collection costs and other obligations incurred by the statutory liquidator?" The court held:

> "The expenses of liquidation must come out of the distributable assets * * *. Section 509 of the Insurance Department Act of 1921, P. L. 789, 40 P. S., Sec. 209, provides for the payment of expenses out of the funds or assets of such exchange. This insurance business could be conducted as required by legislation on the subject and not otherwise. If subscribers were not advised of this provision, their ignorance will not constitute a defense to the defendant for payment; they could only become parties to such reciprocal insurance on the terms allowed by the legislature. If their agreements included provisions pro-

hibited by or inconsistent with the statute, such provisions are nugatory."

The statement is made many times by petitioner, both in his petition and in his supporting brief, that the Supreme Court of Missouri had held that the Superintendent of Insurance had authority to expend funds of the subscribers without prior hearing or notice to those subscribers. We think the foregoing comments on this subject will correctly present the facts and conform to the record. It should be further noted, however, that the subscribers had prior notice and a hearing at every stage of the proceeding through their attorney-in-fact. The power of attorney set out as Appendix III, page 41, petitioner's brief, states:

> "2. Now, therefore, the undersigned as a subscriber of Manufacturing Lumbermen's Underwriters hereby appoint Rankin-Benedict Underwriting Company of Kansas City, Missouri, Attorney-in-fact for us and in our name, place and stead * * * to appear for us in any suit, action, or legal proceeding and to * * * defend * * * any suit, action or other legal proceeding * * *.
>
> "3. Said attorney is hereby specifically authorized for us and in our name to execute any and all documents and to do and perform all other acts * * * necessary * * * to effect compliance under the laws of any state * * * hereby confirming and adopting as binding upon us all appointments for service of process heretofore made."

This power-of-attorney is required to be filed with the Superintendent of Insurance of Missouri under Sec. 6080, R. S. Mo., 1929, of Article 11, dealing with reciprocals, and under Sec. 6081, R. S. Mo., 1939, the attorney-in-fact is required to "file with the Superintendent of Insurance an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of the certificate of authority * * * service of process" is to be made through the Superintendent of Insurance on the at-

torney-in-fact "which shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorneys."

Petitioner's contention is that the funds out of which the expense items in question were paid were not really a part of the assets of the exchange and therefore not subject to the provisions of Sec. 6065, R. S. Mo., 1939, *supra*. That contention, however, can have no support in this record. Under agreement with the attorney-in-fact, it was entitled to 20% of the premiums in payment for management services and for defraying certain expenses. The remaining 80% constituted the only assets which the exchange had for paying claims and otherwise transacting its business. The record shows that the 20% to which the attorney-in-fact was entitled had already been paid to it and therefore no part of that sum came into the custody or control of the Superintendent. The 80% or whatever part of the 80% remained constituted the entire assets of which the Superintendent did have control. It was to protect that 80% that he, as the representative of the state, took charge and it was to protect the subscribers who had paid premiums and had policies that the proceeding was brought. Except for that asset there would have been nothing to conserve, no occasion for incurring or paying any expense and the question here involved would never have arisen.

Petitioner argues that the expense of this proceeding should have been paid by the attorney-in-fact out of the 20% which it received. The record shows that 20% had already been expended, that the attorney-in-fact had no funds, and that that 20% did not come into the custody or under the control of the Superintendent. It was therefore impossible that the administration expenses in this proceeding could have been paid in that way. It may be unfortunate that the subscribers selected an attorney-in-fact who could not or did not successfully operate the business and that by reason thereof it became necessary for the state, through the Superintendent of Insurance, to take charge. That circumstance, however, cannot relieve the assets of the concern from bearing the expense of administration made necessary by the failure of proper administration by the subscribers and their agent, the attorney-in-fact.

## ARGUMENT.

### Petitioner Attempts to Raise Questions Here Not Presented to the Supreme Court of Missouri.

Paragraph 2 of Rule 38 of this Court requires Petitioner to inform the court of "the questions presented." The petition and supporting brief are completely silent on this subject. It may or may not be an oversight. Compliance with that rule, in view of the state of this record, would be most difficult.

The exceptions of petitioner in the trial court did not present or intimate the questions presented here. Neither were they presented to the Supreme Court of Missouri. The first suggestion of these questions, if it could be designated as such, came in petitioner's motion for rehearing in the Supreme Court of Missouri, after that court had decided the case. It is significant to note, however, the language of petitioner in that motion. In Point I, he said, "that the *construction* given by the court to the powers of the Superintendent of the Insurance Department in expending funds of reciprocal insurance subscribers whose property is temporarily in the hands of the Superintendent deprives such subscribers (whom Respondent here represents) of their property without due process of law, in violation of Section 30, Article II, of the Constitution of Missouri, and in violation of the Fourteenth Amendment to the Constitution of the United States. * * *"

In his second point in the motion for rehearing, he said: "The *decision* of the court giving the Superintendent of Insurance authority to pay rent, salaries and the like from the individual funds of the subscribers * * * without prior notice, hearing or order of court violates Section 10, Article I, Clause 1, of the Constitution of the United States and Article I, Section 15, of the Constitution of Missouri, in this: Such construction of the laws

of Missouri amounts to the impairment of the obligation of the contract by the state. * * *" (Emphasis in each of the last two preceding paragraphs ours).

It will be noted and it is significant that petitioner did not claim in his Motion for Rehearing that the *Insurance Code violated the due process or contract clauses of the constitution,* but merely said that the *construction given them by the court and the decision of the court violated those provisions.*

Petitioner, in his two "Assignments of Error" in the petition (page 7 thereof) dresses these points up somewhat differently. They are not at all the points presented to the Supreme Court of Missouri, either in the petition for rehearing (Tr. 1360-1361 or in petitioner's motion to transfer (Tr. 1407-1409) filed in the Supreme Court of Missouri. In the latter court, his motion and all of the arguments which he presented were directed at the *construction* of the Missouri Insurance Code by the Missouri Supreme Court and not at the *validity* of it.

But, when Petitioner appears in this court, the language of his "Assignment of Errors" is changed and the attempt is made to challenge "the Missouri Insurance Code * * * as construed by the Supreme Court of Missouri." The attempt now is to condemn the statute rather than to have it construed as petitioner would like. This attempt appears on page 3 of the supporting brief in this language: "It should be made clear here that the petitioner is not attacking the correctness of the Missouri court's construction of the Missouri statutes. * * *" Notwithstanding that statement, the Petitioner presents to this court almost exactly the same language in support of his attack upon the Code as he presented to the Supreme Court of Missouri in order to obtain the construction of it which he desired.

Petitioner's effort, therefore, must fail both because he did not present to the Supreme Court of Missouri, either timely or otherwise, the constitutional objection

urged here, and because he is changing his position by asking this court to pass upon a question not presented to the Supreme Court of Missouri. The shifting of a few words in the presentation of the question here cannot accomplish the desired purpose. Petitioner did not say to the Supreme Court of Missouri, "The statutes are unconstitutional." Failing in that, he is not in a position to say that for the first time to this court.

This expression from *Goldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434, fits this situation precisely:

> "* * * it is * * * the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below (Citing cases). * * * In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court (Citing cases, parentheses ours)."

Therefore, independently of the fact that the questions petitioner attempts to raise were not raised timely as heretofore discussed, and in fact raised at all, the writ should be denied for the further reason that petitioner

does not present any question to this court that was presented to the Supreme Court of Missouri.

**Supreme Court of Missouri Merely Passed upon the Construction of a State Statute and Not upon Any Federal Question.**

As above demonstrated, the actual question that petitioner presented to the Supreme Court of Missouri and the only question that could be for decision in this Court was not a federal question but merely a question concerning the *construction* of a state statute. Under these circumstances, this Court will deny the petition for writ of certiorari.

*Central Land Company* v. *Laidley,* 159 U. S. 103, 109-110, held:

> "The appellate jurisdiction of this court * * * to a state court, on the ground that the obligation of a contract has been impaired, can by invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, * * * and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. * * *"

*Neblett* v. *Carpenter,* 305 U. S. 297, 302, held:

> "It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.

"It is argued that the authority which the Code confers on the Commissioner to enter into rehabilitation or reinsurance agreements does not embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplated such action.

"It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The state court held the contrary.

"All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We, are, therefore, without jurisdiction to review the state court's decision of any of those questions."

The petition should be denied for still another reason. There is no impairment of the contract clause of the Federal Constitution because, as heretofore noted, no contract right is impaired. The contract between the subscribers and their attorney-in-fact contains no prohibition against the use of any of the funds of the subscriber for the payment of the expenses in question. To read into the contract any such prohibition would do violence to its terms and would be directly contrary to Section 6065, Revised Statutes of Missouri, 1939, which expressly provides, as heretofore noted, that the expenses of this sort of proceeding must be paid out of the assets of the exchange, which assets necessarily include, as the Supreme Court of Missouri held, the premiums paid in by subscribers. The subscribers did not, by their contract, undertake to prevent the state, through its Superintendent of Insurance, from paying those expenses and, if it had, it would be contrary to the provisions of that statute.

The contention that the subscribers were deprived of their property without due process of law in violation of the Federal Constitution must also fail because the

record demonstrates that the subscribers stipulated as to the payment of these items in the two orders and had notice of a third order through their attorney-in-fact and had a hearing before the order was made. The Supreme Court of Missouri so held. In addition to the foregoing, the fact that this proceeding itself is one in which the subscribers are themselves participating, to determine whether these items should be paid, conclusively eliminates any possibility of claiming as a fact that any funds are being expended without notice to the subscribers and a hearing thereon.

**Conclusion.**

The failure of petitioner to comply with the rules of this Court, his failure to present here any federal question which was raised in the Supreme Court of Missouri, his failure to present here any federal question at all, and the fact that the record completely disproves the underlying facts which he must establish, regardless of all other considerations, in order to bring before this Court a federal question, demonstrate that he has failed to sustain the burden imposed upon him by the rules and decisions of this Court to show grounds for granting the petition for writ of certiorari. We earnestly urge that the petition should be denied.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 493.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

## REPLY BRIEF OF PETITIONER, EDWARD L. SCHEUFLER.

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## REPLY BRIEF OF PETITIONER, EDWARD L. SCHEUFLER.

### STATEMENT.

In order to answer the contentions raised by the respondents in their separate briefs filed herein, petitioner files this Reply Brief.

It is significant to note that the brief of each of the respondents is devoted practically entirely to technical objections to the form of the presentation of this cause in this Court. The respondents and the Missouri Supreme Court have consistently avoided determination of the Federal questions raised on the merits. Both briefs are devoted to suggestions that the petition be dismissed, not because the statutes clearly do not offend the Constitu-

tion of the United States, but because of some alleged infraction of some procedural rule.

We will undertake to show in this brief that there has been full compliance with the Rules of this Court in the preparation of the petitioner's brief and petition.

## I.

### The Petition and Brief Comply with the Rules of This Court.

The rules involved in the preparation of a petition for certiorari to state court and supporting brief are Rule 38, Paragraph 2, Rule 12, Paragraph 1, Rules 26 and 27.

The pertinent portion of Rule 38, Paragraph 2, is as follows:

> "2. The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition."

The pertinent portion of Rule 12 is as follows:

> "If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zacht* v. *King*, 260 U. S. 174, 176, 177): specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and

exceptions, by assignment of error): and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matters appear, (*e. g.*, ruling or exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari" (See Rule 38, par. 2).

The pertinent provisions of Rule 27 are as follows:

"1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief.

"2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

"(a) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), text books, and statutes cited, with references to the pages where they are cited.

"(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

"(c) A concise statement of the grounds on which the jurisdiction of this court is invoked.

"(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, *e. g.* (R. 12).

"(e) A specification of such of the assigned errors as are intended to be urged (See Rule 38, par. 2).

"(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and

of law being presented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

"3. Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific and if the reference is to an exhibit both the page number at which the exhibit appears and at which it was offered in evidence must be indicated."

The petition has complied with every provision of these rules.

On page 5 of its brief the respondent corporation has cited a paragraph of Rule 12 (1) not applicable to petitions for certiorari to a state court, though complied with here.

Pursuant to the election afforded by Rule 38, Paragraph 2, the petitioner filed a brief prepared as outlined in Rule 27. This brief satisfies every requirement of Rule 27.

On page 2 of petitioner's brief, paragraph 1, under the title "Jurisdiction," reference is made distinctly to the section of the Judicial Code of the United States which sustains the jurisdiction in this cause. There it is said:

"1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 344, as amended by the action of February 13, 1925, 43 Stat. 937; U. S. C. A., Title 29, Sec. 344."

On page 2, paragraph 2, of the petitioner's brief there is set out step by step with appropriate dates and record references, the original judgment sought to be reversed and each procedural step thereafter.

It is untrue as stated on page 31 of the brief of respondent Central Surety and Insurance Company that on the subject " 'the question presented.' The petition and

supporting brief are completely silent * * *" In addition to the very concise statement of the questions presented on page 2 of the petitioner's brief, the questions presented are reiterated time after time in the petition. These questions are set out specifically in the eighth paragraph of the statement describing the first raising of the questions by motion for rehearing, the questions are again concisely set out in the "Assignments of Error" and in the "Reasons for the Allowance of Writ" contained in the petition for certiorari.

In the Reasons for the Allowance of Writ, in the Assignments of Error, as well as elsewhere, the specific portions of the Constitution of the United States violated, are mentioned and decisions of this Court relied on as illustrating the principles invoked are cited in appropriate places (Petition, pages 5 to 11).

A concise and comprehensive statement of the case showing the questions presented is found in the petition, pages 1 to 6. The questions presented are carefully stated in the petition under the heading Assignments of Error. The questions presented are again stated with citation of authorities under Reasons for Allowance of Writ (pages 9 to 11).

On page 2 of the Petitioner's brief, paragraph 3, the questions presented are again summarized as follows:

> "3. Two questions are raised in this Court. The first question is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted to the Superintendent of Insurance to deal with the funds in individual accounts of reciprocal insurance subscribers, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of his property without due process of law. The second and only other question here raised is whether Secs. 6052 to 6069, R. S. Mo., 1939, in respect of the powers granted the Superintendent of Insurance to spend individual trust funds for expenses for which the individual trust funds were not liable under the contract of the subscriber,

> are in violation of Section 10, Article I, Clause 1, of the Constitution of the United States, forbidding any state to enact a law impairing the obligation of contract."

(The statutes involved are long and are set out verbatim in the appendix to the Brief under the provisions of Rule 27, paragraph 2 (f).)

When respondents charged that nowhere in the petition or brief were the questions presented set out, respondents apparently had not carefully read the petition and brief.

The cases and specific constitutional provisions thought to sustain the jurisdiction of this Court are cited in the petition on pages 10 and 11 under the "Reasons for Allowance of Writ." This argument is developed in the brief, pages 8 to 11.

The stage of the proceeding at which and manner in which the Federal questions were raised is carefully stated in the eighth paragraph of the statement on page 5 of the petition. In the brief under Point 3 of the argument, pages 12 to 15, it is shown that the Federal questions were timely presented with appropriate references to the authorities on the subject.

Respondent O'Malley urges that it is not disclosed to the Court that the Federal questions were first raised on motion for rehearing. This is clearly revealed by the statement in the petition and by the argument in the brief.

It is stated by the respondent corporation that there is no charge that the Missouri Supreme Court wrongfully refused to pass on the Federal questions. This is not true. On page 6 of the petition, it is stated as a fact that the Supreme Court of Missouri refused to write on the constitutional issues raised in the motion for rehearing. On page 7 of the petition, it is stated that the Missouri Supreme Court erred in refusing to pass upon the point relating to the contract clause of the Federal Con-

stitution. On page 8 of the petition, it is charged that the Missouri Supreme Court erred in refusing to pass upon the point involving the due process clause of the Federal Constitution. This is developed in the brief at page 1, where it is stated in language as respectful as possible that, in refusing to write upon the Federal questions, the Missouri Supreme Court was attempting to avoid determination of the Federal questions.

## II.

### The Petitioner Has Sufficient Interest to Maintain This Proceeding Because He Is the Statutory Trustee of an Express Trust of Private Interests and Property.

It is suggested by the respondents that the petitioner does not have sufficient interest to challenge the constitutionality of the Missouri Insurance Code. Respondents urge that a state officer with no personal interest is not permitted by law to challenge the constitutionality of a state statute on federal grounds. Not only is the doctrine relied on by respondents inapplicable in this case, but doubt has been cast upon its validity by a decision of this Court in *Coleman* v. *Miller,* 307 U. S. 433, 83 L. Ed. 1385. However that may be, a prior decision of this Court construing the character of the legal position of the Superintendent of the Insurance Department of Missouri in charge of an insurance company for the purpose of winding up its affairs has definitely settled the right of the Missouri Superintendent to act on behalf of the private individual interest of subscribers, policyholders and creditors. In *Relf* v. *Rundle,* 103 U. S. 222, this Court held that in such cases the Superintendent of the Insurance Department of Missouri acts as the trustee of an express trust with all the rights which properly belong to such position. In so holding the Court said (103 U. S. l. c. 225):

"Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation. He was the statutory successor of the Corporation for the purpose of winding up its affairs. As such he represents the Corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the Corporation itself for all the purposes of winding up its affairs."

The statute construed in the Relf case is Sec. 6058, R. S. Mo., 1939, set out in the appendix to the brief at page 25 is as follows:

"Sec. 6058. *Title of assets to vest in Superintendent.*

Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets (R. S., 1929, Sec. 5947)."

In addition to that section, Sec. 6059, R. S. Mo., 1939, provides further:

> "He (the Superintendent) may also, in his own name as such Superintendent, maintain and defend all actions in the courts of this or any other state, or of the United States, relating to such company, its assets, liabilities, and business."

We do not believe there can be any doubt that the Superintendent on behalf of creditors and subscribers and policyholders, and in his official capacity as statutory trustee therefor, can maintain this proceeding. The Superintendent should be permitted as trustee, to maintain any proceeding and to invoke any provisions of the Federal Constitution that his beneficiaries might maintain or invoke.

III.

**Provisions of the Missouri Insurance Code Here Assailed Were Enacted After the Making of the Contracts Involved and Are Not Therefore to Be Considered As Part of Those Contracts.**

Both respondents argue inferentially that the contracts of subscribers must be considered as if all statutes were read into them. This may be true as to statutes existing at the time of the adoption and execution of the powers of attorney but contracts executed prior to the adoption of the enactment of the statutes assailed are unconstitutionally impaired by such statutes. *Collidge* v. *Long*, 282 U. S. 582.

The Association was formed in 1898. There was immaterial modifications from time to time of the power of attorney. The last modification was made in 1933. The Missouri Insurance Code permitting the Superintendent to violate the individual funds of these subscribers without notice of hearing did not become effective until after April 12, 1934 (See Laws of Missouri, 1933-34 Extra Session, pages 71, 178).

This is not an emergency moratorium law such as passed on in *Viex* v. *Sixth Ward Building and Loan Association*, 310 U. S. 32, cited by Respondent O'Malley.

## IV.

### The Constitutional Questions Were Timely Raised Under the Missouri Practice.

The existence of a Federal question is to be determined by the Federal decisions rather than the State decisions. *International Harvester Company* v. *State of Missouri ex inf. Attorney General,* 234 U. S. 199; *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 281 U. S. 673; *Beekman Lumber Company* v. *Acme Harvester Company,* 215 Mo. 221.

However, respondent urges that the constitutional questions were not timely raised under the Missouri practice. This argument is not correct. The Missouri courts hold that the first opportunity to charge unconstitutionality occurs after the statute involved has been unconstitutionally construed. See *Woodling* v. *Westport Hotel Operating Company,* 331 Mo. 812, 55 S. W. 2d 477, where it is said, l. c. 479:

> "* * * Relying on the general rule that a constitutional question raised for the first time in the motion for a new trial comes too late to give this court jurisdiction when it would not otherwise have jurisdiction, respondents say: 'The alleged constitutional question upon which the appeal to this court is based was not timely raised,' and the case should be transferred to the Court of Appeals. Appellants reply that the ruling of the court in its final judgment and decree that appellants did not come into the equitable case within the time required by statute and thereby lost the right to have a lien established and enforced was the first occasion in the course of the case that the provisions of the statute relating to an equitable suit of this kind were invoked and held to operate as a bar to their lien claim, and that the motion for a new trial was therefore the earliest opportunity afforded them to challenge the constitutionality of such statute. Appellants point out that respondents' demurrers to their intervening petition did not raise any question as to their right under the statute in ques-

tion to have their lien claim enforced in the equitable suit, and that the demurrers were overruled, that respondents did not plead the provisions of the statute relating to the equitable proceeding in bar of appellant's lien claim or the right to maintain and enforce same in that suit, and that the objection made by respondents to the introduction of any testimony on the ground that appellants had not entered the suit within the time prescribed by the provisions of the statute relating to the equitable suit was, by the court, overruled. Thus it appears that there was no occasion or opportunity for appellants to challenge the statute by pleading, and the ruling of the court upon respondents' objection to the introduction of any testimony was adverse to respondents' contention, and did not afford appellants opportunity thereupon to challenge the constitutionality of the statute. 'A constitutional question must be raised timely in the course of orderly procedure. Accordingly, it should be raised in the pleadings if due to be found there; if not, then at the first opportunity, and kept alive. * * * In rare cases * * * it may be raised for the first time in the motion for new trial.' *Miller* v. *Connor,* 250 Mo. 677, 157 S. W. 81, 83. We are inclined to think that, under the procedure had and the circumstances of this case, appellants' attack upon the constitutionality of the sections of the statute involved was made at the earliest opportunity arising in the course of orderly procedure."

There were no pleadings in this summary proceeding setting up the bar of the statute. Under the Missouri rule any charge before the unconstitutional construction of the statute occurred to the effect that the statute would be unconstitutional if given a certain construction would be insufficient to raise a constitutional question. See *State ex rel. Volker* v. *Kirby,* 345 Mo. 801, 136 S. W. 2d 319. In this case as in the Woodling case the constitutional issue was first raised immediately following the first adverse judgment construing the statute in the manner charged to be unconstitutional.

**Conclusion.**

In conclusion your petitioner respectfully submits that the technical objections made by respondents are unfounded; that the serious constitutional questions here raised should be determined by this Court and that its writ of certiorari should issue to that end.

Respectfully submitted,

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